



May 11, 2006

RE: RFP DGS-2053 **ADDENDUM #30A**

TO ALL INTERESTED BIDDERS:

This addendum makes changes or corrections to the Appendices B-1, B-2, B-3, and B-4, Model Contract Language.

Copies of all the changed pages are included in this addendum. All comments submitted were considered and any changes applied to the current versions of Appendices B-1, B-2, B-3, and B-4, Model Contract Language, to maintain the continuity and currency of these documents.

Red-lined versions of each module are also posted for your convenience and information only.

Please use the attached pages to update your versions of Appendices B-1, B-2, B-3, and B-4.

This addendum represents the final extensive revision of the Contract Language anticipated by the State.

The RFP allows bidders the opportunity to protest requirements made by an addendum (see Section 2.5.1, Initial Protest). Any Initial Protest made for this addendum must be submitted by 5:00pm Pacific Time, May 18, 2006:

Please send any questions to me via e-mail.

Sincerely,

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### **Model Contract Language, Module 1**

**#9, page 6.** Deleted the second sentence.

**#11, pages 6-7.** Edited items '11b' and '11c'.

**#15, page 9.** Edited item '15d'.

**#19, page 12.** Edited item '19c'.

**#20, page 13.** Edited item '20b.v'.

**#23, pages 15-16.** Edited text and dollar amount in item '23a'. Edited items '23 c' and '23d'.

**#46, page 30.** Replaced all text.

**#51, page 32.** Added text to the end of the first sentence, near the middle of the paragraph.

**#70, pages 42-43.** At the bottom of page 42: added commas in the first sentence, before and after the phrase "or suite of services"; added commas in the third sentence, before and after the phrase "or suite of services". At the top of page 43: edited the sentence that begins, "At the end of each Contract year,".

**#77, page 48.** Edited the second line of item 'g'.

**#78, page 49.** Edited the sixth and seventh lines of the paragraph.

**#82, page 51.** Edited the end of the next-to-the-last sentence that begins with, "Contractor and each such subcontractor...".

### **Model Contract Language, Module 2**

**#9, page 6.** Deleted the second sentence.

**#11, page 7.** Edited items '11b' and '11c'.

**#15, page 9.** Edited item '15d'.

**#19, page 12.** Edited item '19c'.



**#20, page 13.** Edited item '20b.v'.

**#23, pages 15-16.** Edited text and dollar amount in item '23a'. Edited items '23 c' and '23d'.

**#46, page 30.** Replaced all text.

**#51, page 32.** Added text to the end of the first sentence, near the middle of the paragraph.

**#70, pages 42-43.** At the bottom of page 42: added commas in the first sentence, before and after the phrase "or suite of services"; added commas in the third sentence, before and after the phrase "or suite of services". At the top of page 43: edited the sentence that begins, "At the end of each Contract year,".

**#77, page 48.** Edited the second line of item 'g'.

**#78, page 49.** Edited the sixth and seventh lines of the paragraph.

**#82, page 51.** Edited the end of the next-to-the-last sentence that begins with, "Contractor and each such subcontractor...".

### **Model Contract Language, Module 3**

**#9, page 6.** Deleted the second sentence.

**#11, page 7.** Edited items '11b' and '11c'.

**#15, page 9.** Edited item '15d'.

**#19, page 12.** Edited item '19c'.

**#20, page 13.** Edited item '20b.v'.

**#23, pages 15-16.** Edited text and dollar amount in item '23a'. Edited items '23 c' and '23d'.

**#46, page 30.** Replaced all text.

**#51, page 32.** Added text to the end of the first sentence, near the middle of the paragraph.



**#70, page 42.** Added commas in the first sentence, before and after the phrase “or suite of services”. Added commas in the third sentence, before and after the phrase “or suite of services”. Edited the sentence that begins, “At the end of each Contract year,”.

**#77, page 48.** Edited the second line of item ‘g’.

**#78, page 49.** Edited the sixth and seventh lines of the paragraph.

**#82, page 51.** Edited the end of the next-to-the-last sentence that begins with, “Contractor and each such subcontractor...”.

### **Model Contract Language, Module 4**

**#9, page 6.** Deleted the second sentence.

**#11, page 7.** Edited items ‘11b’ and ‘11c’.

**#15, page 9.** Edited item ‘15d’.

**#19, page 12.** Edited item ‘19c’.

**#20, page 13.** Edited item ‘20b.v’.

**#23, page 16.** Edited text and dollar amount in item ‘23a’. Edited items ‘23 c’ and ‘23d’.

**#46, page 31.** Replaced all text.

**#51, page 33.** Added text to the end of the first sentence, near the middle of the paragraph.

**#70, pages 42-43.** At the bottom of page 42: added commas in the first sentence, before and after the phrase “or suite of services”; added commas in the third sentence, before and after the phrase “or suite of services”. At the top of page 43: edited the sentence that begins, “At the end of each Contract year,”.

**#77, page 48.** Edited the second line of item ‘g’.

**#78, page 49.** Edited the sixth and seventh lines of the paragraph.

**#82, page 51.** Edited the end of the next-to-the-last sentence that begins with, “Contractor and each such subcontractor...”.

# Module 1

## **8. CONTRACTOR'S POWER AND AUTHORITY**

Contractor represents and warrants to the State that Contractor has full power and authority to grant the rights herein granted. Further, Contractor avers that it will not enter into any arrangement with any third party which might abridge any rights of the State under this Contract.

The Services provided by Contractor shall be under the control, management, and supervision of Contractor. Contractor is fully responsible for all work performed under this Contract including subcontracted work. Contractor is wholly responsible for the performance of its employees, agents, subcontractors and suppliers in fulfilling its obligations described in this Contract.

## **9. ASSIGNMENT**

This Contract shall not be assignable by Contractor in whole or in part without the prior written consent of the State, which will not be unreasonably withheld.

## **10. WAIVER OF RIGHTS**

Any action or inaction by either party or the failure of either party on any occasion, to enforce any right or provision of the Contract, shall not be construed to be a waiver by such party of its rights hereunder and shall not prevent the parties from enforcing such provision or right on any future occasion. The rights and remedies of the parties herein are cumulative and are in addition to any other rights or remedies that the parties may have at law or in equity. A waiver by either of the parties hereto of any of the covenants to be performed by the other or any breach thereof shall not be construed to be a waiver of any succeeding breach thereof or of any other covenant herein contained. All waivers must be in writing and signed by the party waiving its rights.

## **11. ORDER OF PRECEDENCE**

In the event of any inconsistency between the articles, attachments, specifications or provisions which constitute this Contract, the following order of precedence shall apply:

- a. These General Provisions and any amendments thereto, including all of the attachments and Contract forms.
- b. The specifications and requirements contained in the RFP as incorporated herein and the agreements to meet the specifications and requirements in the RFP as stated in the Proposal. (The parties acknowledge and agree that silence in the Proposal with respect to a particular RFP specification or requirement equals consent by Contractor.)

- c. All other documents incorporated in the Contract by reference.
- d. All regulatory filings made pursuant to the terms and conditions of this Contract.

## **12. DELIVERY**

Contractor shall strictly adhere to the delivery and completion schedules specified in this Contract subject to Section 28. Time, if stated as a number of days, shall mean calendar days unless otherwise specified. If Contractor delivers in excess of the quantities or Services specified herein, the State shall not be required to make any payment for the excess Deliverables or Services, and may return them to Contractor at Contractor's expense or utilize any other rights available to the State at law or in equity.

## **13. SUBSTITUTIONS**

Substitution of Deliverables and Services may not be tendered without advance written consent of the State. The State will not unreasonably withhold its consent. Contractor shall not use any specification in lieu of those contained in the Contract without written consent of the State.

## **14. INSPECTION, ACCEPTANCE AND REJECTION**

Unless otherwise specified in the Contract:

- a. Contractor and its subcontractors will provide and maintain a quality assurance system mutually agreed upon by the Contractor and the State covering Deliverables and Services under this Contract and will tender to the State only those Deliverables and Services that have been inspected and found to conform to this Contract's requirements. Contractor will keep records consistent with the agreed upon quality assurance system, and will make these records available to the State, on reasonable prior notice and at reasonable times and places during Contract performance and for four years after final payment. Contractor shall permit the State to review procedures, practices, processes, and related documents to determine the extent to which Contractor's quality assurance system or other similar business practices directly related to performance of the Contract conform to the requirements of this Contract.
- b. All Deliverables and Services may be subject to inspection and test by the State or its authorized representatives.

- d. Contractor represents and warrants that, as of the Effective Date, there is no outstanding or reasonably anticipated civil or criminal litigation, arbitrated matter, or other dispute, in any forum, to which Contractor or any of its Affiliates is a party that, if decided unfavorably to Contractor or its Affiliates, would reasonably be expected to preclude Contractor from entering into this Contract or have a material adverse effect on Contractor's ability to fulfill its obligations hereunder.
- e. Contractor represents and warrants (i) all Equipment, networks, Software and other resources utilized or provided by Contractor in connection with the Deliverables and Services (collectively, the "**Provided Resources**") shall be successfully interfaced with, and shall be compatible with, the services, systems, items, and other resources of the State and its other third party service providers with which they will interoperate (collectively, the "**State Resources**"), and (ii) none of the Deliverables, Services or other items provided to the State by Contractor shall be adversely affected by, or shall adversely affect, the State Resources or any Services provided by any such third party service providers, in any material respect, whether as to functionality, speed, service levels, interconnectivity, reliability, availability, performance, response times, or otherwise.
- f. Contractor represents and warrants that: (i) it has conducted a full and complete analysis of the State's requirements as specified in this Contract; (ii) it has performed sufficient due diligence investigations regarding the scope and substance of the Services and the Deliverables; (iii) it has received sufficient answers to all questions that it has presented to the State regarding the scope and substance of the Services and the Deliverables as well as the workings, capabilities, procedures, and capacities of the State's networks, equipment, hardware, and software associated with the provision of the Services and Deliverables; and (iv) it is capable in all respects of providing the Services and Deliverables in accordance with this Contract. Contractor hereby waives and releases any and all claims that it now has or hereafter may have against the State based upon any inaccuracy or incompleteness of the information it has received with regard to the scope and substance of the Services and the Deliverables, except where such information was willfully withheld or intentionally misrepresented by the State and where such claims are permitted under California law. Further, Contractor covenants that it shall not seek any judicial rescission, cancellation, termination, reformation, or modification of this Contract or any provision hereof, nor any adjustment in the charges to be paid for the Deliverables or Services, based upon any such inaccuracy or incompleteness of information except where such information was willfully withheld or intentionally misrepresented by the State.
- g. Contractor represents and warrants that Contractor, at Contractor's expense, shall (and shall cause all of its subcontractors to) maintain all Equipment, Systems, networks, and Software operated or used in performance of its obligations hereunder so that they operate in accordance with the service levels and their respective specifications, including: (i) maintaining such items in good operating condition, subject to normal wear and tear, (ii) performing repairs and preventative maintenance in a timely manner and in accordance with the manufacturer's recommendations and requirements; and (iii) performing Software maintenance in accordance with the applicable Software supplier's recommendations and requirements.
- h. All warranties, including special warranties specified elsewhere herein, shall inure to the State, its successors, assigns, Customers, and End-Users of the Deliverables or Services.



- c. Contractor and the State agree that the State shall have no obligation to pay any amount to Contractor upon the termination for convenience, other than, and in accordance with the terms of this Contract, the agreed price for Deliverables or Services accepted by the State and not previously paid for, adjusted for any savings on freight and other charges plus any unrecovered amortized capital costs originally identified in writing by Contractor and approved in advance by the State, calculated using Generally Accepted Accounting Principles. Contractor shall submit a final termination settlement proposal within ninety (90) calendar days from the effective date of termination.

## **20. TERMINATION FOR DEFAULT**

- a. The State may, subject to the clause titled “Force Majeure” (Section 21) and to subsection d. below, by written notice of default to Contractor, terminate this Contract in whole or in part if Contractor fails to:
  - i. Deliver the Deliverables or perform the Services within the time specified in the Contract or any amendment thereto;
  - ii. Make progress, so that the lack of progress endangers performance of this Contract; or
  - iii. Perform in accordance with any of the other provisions of this Contract.
- b. The State’s right to terminate this Contract under subsection a. above, may be exercised if (i) the failure constitutes a material breach of this Contract and if Contractor does not cure such failure within the time frame stated in the State’s cure notice, which in no event will be less than thirty (30) calendar days, unless a shorter period is specifically set forth elsewhere under this Contract; or (ii) there are repeated or numerous failures by Contractor for which the State has provided notice, which collectively constitute a material breach of this Contract. Without limiting the generality of the foregoing, Contractor hereby agrees that each of the following events shall be deemed a material breach by Contractor:
  - i. Contractor’s failure to comply with its obligations under Sections 36.a, 77, 78, 83.a and/or 84;
  - ii. Submission of inaccurate reports or invoices that result in a material adverse financial impact on the State;
  - iii. Any modifications or alterations to an Ordering Document, Individual Price Reduction Notification document, Authorization to Order Under State Contract or ICB Pricing documentation by Contractor that were not authorized or approved by the State;
  - iv. Contractor’s refusal to provide Services and Deliverables requested hereunder pursuant to a proper Ordering or Individual Price Reduction Notification Document; and
  - v. Any efforts by Contractor, without the State’s prior approval, to market to or otherwise solicit the following entities to enter into a separate agreement for deliverables and services that are the same or substantially similar to the Deliverables and Services: (a) an

entity that is receiving such particular Deliverables and Services under this Contract or (b) an entity that is mandated by the State to obtain Deliverables and Services pursuant to this Contract.

- c. If the State terminates this Contract in whole or in part pursuant to this Section, it may acquire from an alternative provider, under terms and in the manner the State considers appropriate, Deliverables or Services similar to those terminated, and Contractor will be liable to the State for the State's Cost to Cover (but subject to the clause entitled "Limitation of Liability" (Section 23)). However, Contractor shall continue to provide all Deliverables and Services not expressly terminated by the State.
- d. If the Contract is terminated for default, the State shall be entitled to require Contractor to, and Contractor shall, transfer title, or in the case of licensed Software, license, and deliver to the State, as directed by the State, any;
  - i. Completed Deliverables, and
  - ii. Partially completed Deliverables.

Upon direction of the State, Contractor shall also protect and preserve property in its possession in which the State has an interest.

- e. The State shall pay the agreed upon Contract price for completed Deliverables, partially completed Deliverables provided pursuant to subsection d. above, and Services delivered and accepted.
- f. If, after termination, it is determined by a final ruling in accordance with the dispute resolution process under this Contract that Contractor was not in default, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the State.
- g. The rights and remedies of the State in this clause are in addition to any other rights and remedies provided by law or under this Contract, and are subject to the clause titled "Limitation of Liability" (Section 23).
- h. Except as may be permitted or required under the United States Bankruptcy Code or Section 36.a, Contractor may not, for any reason whatsoever, terminate this Contract or otherwise repudiate this Contract or refuse to perform its obligations hereunder.

## **21. FORCE MAJEURE**

- a. Contractor shall not be liable for any default or delay in the performance of its obligations under this Contract if and to the extent such default or delay arises from fire, flood, earthquake, elements of nature or acts of God, wars, riots, civil disorders, rebellions or revolutions, acts of terrorism or any other similar cause beyond the reasonable control of Contractor except to the extent that Contractor is at fault in failing

equitably adjusted in a manner such that the State is not required to pay any amounts for Services that it is not receiving.

- f. Without limiting Contractor's obligations under this Contract, or impairing Contractor's emergency service and public safety priority requirements for its customers generally, whenever a force majeure event or disaster causes Contractor to allocate limited resources between or among its customers, the State shall receive at least the same treatment as comparable Contractor customers consistent with Contractor's obligations and duties for public safety emergency service priority response and restoration as required by applicable law and regulation and separate contractual obligations with emergency service providers.

## **22. RIGHTS AND REMEDIES OF STATE FOR DEFAULT**

- a. In the event any Deliverables furnished or Services provided by Contractor in the performance of the Contract should fail to conform to the requirements herein, the State may reject the same, and it shall become the duty of Contractor to reclaim and remove the Deliverable promptly or to correct the performance of the Services, without expense to the State, and immediately replace or re-perform all such rejected Deliverables or Services, as applicable, with others conforming to the Contract.
- b. In addition to any other rights and remedies the State may have, the State may require Contractor, at Contractor's expense, to ship Deliverables via air freight or expedited routing to avoid or minimize actual or potential delay if the delay is the fault of Contractor.
- c. In the event of the termination of this Contract, either in whole or in part, by reason of default or breach by Contractor, any loss or damage sustained by the State in procuring any items or Services which Contractor agreed to supply shall be borne and paid for by Contractor, subject to the Limitation of Liability included in this Contract.

## **23. LIMITATION OF LIABILITY**

- a. Contractor's liability for damages to the State for any cause whatsoever, and regardless of the form of action, whether in contract or in tort, shall be limited to \$300 Million, except as expressly set forth below.
- b. The State's liability for damages for any cause whatsoever, and regardless of the form of action, whether in contract or in tort, shall be limited to the total charges due and payable to Contractor hereunder that have not been paid to Contractor. Nothing herein shall be construed to waive or limit the State's sovereign immunity or any other immunity from suit provided by law.

- c. Neither Contractor nor the State will be liable for consequential, incidental, indirect, special, or punitive damages, even if notification has been given as to the possibility of such damages, except as expressly set forth below.
- d. Sections 23(a) and (c) will not apply to Contractor's liability for damages (i) to the extent that Contractor's liability for such damages is specifically set forth in the Statement of Work; (ii) in connection with liability under the provision, entitled "Patent, Copyright, and Trade Secret Protection" (Section 32) or to any other liability (including without limitation indemnification obligations) for infringement of third party Intellectual Property Rights; (iii) in connection with claims covered by any specific provision herein calling for performance deficiency charges; (iv) in connection with claims arising under provisions herein calling for indemnification for third party claims against the State for bodily injury to persons or damage to real or tangible personal property caused by Contractor's negligence or willful misconduct; (v) in connection with costs or attorneys' fees that the State becomes entitled to recover as a prevailing party in any action; (vi) in connection with breaches of Contractor's obligations of confidentiality; (vii) in connection with claims based upon a breach of Section 36.a hereof or upon any repudiation of this Contract by Contractor or Contractor's refusal to perform its duties and obligations hereunder; (viii) for Cost to Cover damages; (ix) in connection with Contractor's failure to perform its obligations under Section 21 in the event of a force majeure event; or (x) in connection with Contractor's failure to comply with the terms of Section 30.

## **24. CONTRACTOR'S LIABILITY FOR INJURY TO PERSONS OR DAMAGE TO PROPERTY**

- a. Contractor shall be liable for damages arising out of injury to person(s) and/or damage to the property of the State, employees of the State, or any other person(s) designated by the State for any purpose, prior to, during, or subsequent to delivery, installation, acceptance, and use of the Deliverables or Services either at Contractor's site or at the State's place of business, provided that the injury or damage was caused by the fault, negligence, or willful misconduct of Contractor.
- b. Contractor shall not be liable for damages solely arising out of or caused by an alteration or an Attachment not made or installed by Contractor, or for damage to alterations or Attachments that may result from the normal operation and maintenance of the Deliverables provided by Contractor during the Contract.

## **25. INDEMNIFICATION**

Contractor agrees to indemnify, defend and hold harmless the State, its officers, agents and employees from any and all third party claims, losses, damages, liabilities, costs and expenses (including without limitation reasonable attorneys' fees and costs), and losses due to the injury or death of any individual, or the loss or damage to any real or tangible personal property, resulting from the willful misconduct or negligent acts or omissions of Contractor or any of its agents, subcontractors, employees, suppliers, laborers, or any other person, firm, or corporation furnishing or supplying work, Deliverables, Services,

- i. Will receive a copy of the company's drug-free policy statement; and
- ii. Will agree to abide by the terms of the company's statement as a condition of employment on the Contract.

#### 44. FOUR-DIGIT DATE COMPLIANCE

Contractor represents and warrants to the State that it will provide only Four-Digit Date Compliant (as defined below) Deliverables and/or Services to the State. **"Four Digit Date Compliant"** Deliverables and Services can accurately process, calculate, compare, and sequence date data, including without limitation date data arising out of or relating to leap years and changes in centuries. This warranty and representation is subject to the warranty terms and conditions of this Contract and does not limit the generality or warranty obligations set forth elsewhere herein.

#### 45. SWEATFREE CODE OF CONDUCT

- a. Contractor declares under penalty of perjury that no Equipment, materials, or supplies furnished to the State pursuant to the Contract have been produced in whole or in part by sweatshop labor, forced labor, convict labor, indentured labor under penal sanction, abusive forms of child labor or exploitation of children in sweatshop labor, or with the benefit of sweatshop labor, forced labor, convict labor, indentured labor under penal sanction, abusive forms of child labor or exploitation of children in sweatshop labor. Contractor further declares under penalty of perjury that they adhere to the Sweatfree Code of Conduct as set forth on the California Department of Industrial Relations website located at <http://www.dir.ca.gov> and Public Contract Code Section 6108.
- b. Contractor agrees to cooperate fully in providing reasonable access to its records, documents, agents or employees, or premises if reasonably required by authorized officials of the State, the Department of Industrial Relations, or the Department of Justice to determine Contractor's compliance with the requirements under paragraph (a).

#### 46. RECYCLING

Contractor shall certify in writing under penalty of perjury, the minimum, if not exact, percentage of post consumer material as defined in the Public Contract Code Section 12200, in products, materials, goods, or supplies offered or sold to the State regardless of whether the product meets the requirements of Section 12209. With respect to printer or duplication cartridges that comply with the requirements of Section 12156(e), the certification required by this section shall specify that the cartridges so comply (PCC 12205).

invoices the performance deficiency charge. If a cure to the State's satisfaction has not been achieved during the permitted cure period, the State may invoice Contractor for the performance deficiency charge(s). Contractor shall pay to the State or its designee all performance deficiency charges within thirty (30) calendar days of receipt of an invoice therefor. Notwithstanding the preceding sentence, Contractor may in good faith dispute that it failed to perform its obligations under this Contract with respect to the performance of administrative, reporting, and relationship management functions by providing written notice of such dispute. In the event of such a dispute, Section 35 will be followed prior to the Contractor being obligated to pay the disputed part of the invoice. Such performance deficiency charges shall constitute agreed fee reductions and not penalties or liquidated damages hereunder.

- b. Without limiting paragraph (a) of this Section: (i) the State has identified in RFP Section 4.5.10, Table 4A, certain amounts the State may assess as performance deficiency charges for certain situations (which may be modified from time to time upon agreement by the parties); and (ii) the parties presently anticipate that (a) DTS/ONS shall issue any invoices for performance deficiency charges and facilitate the meetings described in this Section, and (b) Contractor shall pay any performance deficiency charges to the entity identified by the State as the beneficiary of the Deliverables and Services to which the performance deficiency charges relate.
- c. Contractor shall provide all assistance and support reasonably necessary for the administration of such performance deficiency charges, including, the provision of additional documentation regarding Contractor's performance hereunder and the payment of the performance deficiency charges as directed by the State.
- d. Contractor may not earn back, with subsequent performance or otherwise, the amounts of any performance deficiency charges that become due the State.

## 51. SET-OFF RIGHTS

Notwithstanding anything to the contrary in this Contract, and in addition to the other rights of the State and/or the applicable Customer hereunder with respect to disputing invoices or withholding amounts, the State and/or the applicable Customer, in its sole discretion, may set off against any and all amounts otherwise payable to Contractor pursuant to any of the provisions of this Contract: (i) any and all amounts claimed by the State and/or the applicable Customer in good faith to be owed by Contractor to the State and/or the applicable Customer pursuant to any of the provisions of this Contract; and (ii) any and all amounts that the State and/or the applicable Customer believes in good faith that it does not owe to Contractor pursuant to any of the provisions of this Contract. Within twenty (20) calendar days after any such set-off by the State and/or applicable Customer, the State and/or applicable Customer shall provide Contractor with a written accounting of such set-off, a written statement of the reasons therefore, and a reasonable opportunity to meet and discuss the claimed set-off. In the event Contractor does not agree with the set-off applied, Contractor or applicable Customer may contact DTS/ONS to seek equitable resolution or exercise its right under applicable law. The escalation procedure beyond the project manager in Section 35 shall not apply.

specifically requested by the State), Contractor will make such Enhancements available to the State under this Contract at no additional cost to the State. When the Enhancements do not substitute, replace or improve Deliverables or Service items already being received by the State under this Contract, but instead add to the Deliverables or Service items additional material functionality and features, Contractor will make such Enhancements available to the State under this Contract and provide competitive pricing therefore unless Contractor in its sole discretion determines that the Enhancement would be provided at no additional charge. With each proposal to add an Enhancement, Contractor will provide a business case that includes potential users and market analysis that illustrates competitive pricing, if applicable. The State, in its sole discretion, shall determine whether to approve of such Enhancement's inclusion under this Contract. If the State chooses to proceed hereunder, the State and Contractor will negotiate in good faith to agree on the additional terms and conditions, if any, under which the Enhancement will be added to this Contract through amendment and Contractor shall update any applicable marketing plans used in connection with the provision of the Deliverables and Services hereunder. Contractor understands that DTS/ONS is fully responsible for this approval and agrees, absent written approval from DTS/ONS, Enhancements cannot be added to this Contract at the request of any State or non-State Agency. Consistent with and without limiting anything set forth in Section 57, nothing in this Section shall prohibit the State from pursuing or obtaining the same or similar Enhancements with or from its other providers of Module Services or requiring that certain Enhancements may only be obtained from certain providers of Module Services.

#### **69. PRICING AND SERVICE REVIEW**

For the purpose of maintaining competitiveness throughout the Term, Contractor agrees to joint review of its pricing and Service functionality annually, or more frequently (not to exceed three (3) such reviews in any twenty-four (24) month period unless otherwise agreed by the parties) at the State's request, to ensure the State and its Customers will receive cost-competitive and technologically competitive Services throughout the Term. Contractor agrees that written amendments to this Contract to reduce statewide rates and introduce technological Service improvements may be submitted throughout the Term.

#### **70. "MOST FAVORED NATION" STATUS OF STATE**

Contractor agrees to give the State and Customers of this Contract "Most Favored Nation" status, in that Contractor agrees that no other similarly situated public customer of Contractor or any of its Affiliates will receive rates for a substantially similar service, or suite of services, offered under substantially similar terms and conditions that are lower than the statewide rates provided hereunder when the volume of business from the other public customer is equal to or less than the volume of business the State delivers under this Contract. Contractor agrees to promptly bring to State's attention instances in which other public customers of Contractor or any of its Affiliates may receive lower rates for substantially similar services. If Contractor or its Affiliates offer lower rates to any other public customer for the same or a substantially similar service, or suite of services, offered under substantially similar terms and conditions, Contractor shall adjust the State's rates prospectively to match or beat such rates. If Contractor offers a bundled package of Deliverables and/or Services under substantially similar terms and conditions to other

public Customers at a rate lower than the rate(s) charged to the State for such Deliverables and/or Services provided under this Contract, the State reserves the right to order a similarly bundled package of Deliverables and/or Services at such lower rate. At the end of each Contract year, an executive level officer of Contractor shall certify in writing to the State that Contractor has complied with this provision. If Contractor is not in compliance with this Section, Contractor and the State shall make adjustments and/or payment as necessary and described above and in Section 50. Nothing herein shall be construed to require Contractor to offer, provision or sell Services in a manner that conflicts with applicable laws or regulations.

Rates established through the ICB and IPR processes described in Sections 71 and 72 respectively are exempt from this “Most Favored Nation” qualification.

## **71. INDIVIDUAL CASE BASIS (ICB) PRICING**

The State requires Contractor to list all Services in Attachment 3 and all Service pricing in Attachment 4. However, the State recognizes there may be instances where Contractor cannot anticipate or establish a specific cost for a Service because of issues such as complexity, facility availability, or other Service provisioning requirements. The State will consider the use of Individual Case Based Pricing only in specific situations and under the parameters detailed below:

- a. Contractor will provide documentation to the State that demonstrates that its ICB Pricing is developed through its corporate ICB process and is consistent with CPUC and other appropriate regulatory guidelines as applicable. Contractor further affirms that ICB Pricing opportunities will be offered in a consistent manner to all eligible Customers.
- b. ICB Pricing is a Customer specific pricing methodology approved by applicable regulatory agencies. The following components are examples of elements to be considered in developing an ICB Pricing methodology:
  - i. Capital investment required by Contractor, including the pro-rata share of existing capital and new incremental capital dedicated to the opportunity.
  - ii. Related expense to provide the Service, including expense such as installation, repair, billing, monitoring, on-going maintenance and other business and operating expense.

Contractor shall provide to the State a description of the components of its approved ICB Pricing methodology as part of the documentation required under subsection (a), above.

ICB Prices will only be offered if the prices are determined by Contractor and the State to be financially feasible and in the interest of the Customer. In the event a Customer requests Service that Contractor deems financially unfeasible, Contractor will provide the rationale for its decision and discuss other potential Service options with DTS/ONS before advising the Customer of the unavailability of ICB Prices.



State all necessary additional Contractor personnel to accelerate performance as may be required or necessary to timely achieve compliance or, if Contractor has already failed to comply, achieve compliance within a re-adjusted time frame established by the State. Contractor shall have seven (7) calendar days, or longer if agreed to by the State in writing, to achieve compliance. For each material Disentanglement or Transition-Out requirement not completed after the notice of non-compliance period, the State shall be entitled to invoice Contractor for up to \$2,000 per day for each material deficiency, not to exceed \$10,000 per day for all deficiencies until Contractor is in material compliance with the requirements of the Transition-Out Plan. The Contractor may exercise its dispute rights under Section 35 above in the event that Contractor disagrees with the State's application of this Section; however, pending final resolution of any dispute, Contractor shall diligently proceed without disruption or delay with the performance of the Transition-Out Plan.

- e. Charges. All Disentanglement Services performed by Contractor during the transition shall be performed by Contractor at no additional cost to the State beyond what the State would pay for the Services. Unique services requested by the State will be priced as agreed upon by the parties.
- f. Delivery of State Data. Contractor shall provide to the State all State data and documentation and other information reasonably requested by the State in connection with the transition that is sufficient to enable the State, or another reasonably competent service provider, to fully assume the provision of any terminated Services. Except as Contractor is otherwise required to retain such data under this Contract or by law, Contractor shall destroy all copies of State data not turned over to the State.
- g. Inventory. To the extent applicable to the Services provided by Contractor hereunder, Contractor shall provide to the State as complete and accurate an inventory as is reasonably practicable of all Software, data, Equipment, materials, third party licenses, third party leases, and third party contracts used to provide the Services, as well as the location thereof, entities serviced under this Contract by such items, and such other information regarding such items as the State reasonably requests.
- h. Transfer of Assets. Effective as of the date of termination, Contractor shall, subject to Section 87, use commercially reasonable efforts to convey to the State (or its designee) such physical assets as the State may, in its sole discretion, select from among those assets that are onsite CPE and substructure not already fully paid for by the State and used by Contractor solely in or for the provision of Services to the State, excluding those assets expressly agreed upon by the parties in writing from time to time, at a price consisting of the aggregate net book value of such selected assets at that time, less the amount(s) already paid by the State for such assets.
- i. Transfer of Leases, Licenses and Contracts. Effective as of the date of termination, Contractor, at its expense, shall use commercially reasonable efforts to convey or assign to the State (or its designee) such leases, licenses, and other contracts as the State may, in its sole discretion, select from among those directly associated with the use of properties, Software, or other goods or services by Contractor that were specifically obtained, licensed or purchased in order for the State to obtain Services. Notwithstanding anything to the contrary in this Contract, Contractor shall be responsible for the satisfaction and performance of all obligations (including all financial obligations) under any such leases, licenses, and other contracts that may be assigned or conveyed to the State (or its designee) with respect to periods prior to the date of any such conveyance or assignment.

- j. License. Except as otherwise provided herein, Contractor shall use commercially reasonable efforts to assign or license to the State (or its designee) whatever rights Contractor possesses at the time of Disentanglement with regard to Software, materials and other items that are needed in order to allow the State (or its designee) to continue to perform and receive the benefit of the Services. To the extent allowed by the applicable owner or licensor and to the extent the following are accessible by Contractor, Contractor shall provide the State with a full and complete copy of each such item that constitutes Software, in such forms and media as reasonably requested by the State, together with all object code, source code, and then-available documentation thereto.

## 78. REPORTS, DATA AND INVENTORY

Contractor shall provide all reports required by this Contract or otherwise reasonably requested by the State. In addition to performing its obligations under Sections 77.f and 77.g as part of Disentanglement Services, upon the State's reasonable request, at reasonable intervals and for any reason related to the Contract and Services provided under the Contract, during the Term of the Contract, Contractor shall: (a) provide to the State all State data and documentation and all other information reasonably requested by the State; and (b) Contractor shall provide to the State as complete and accurate an inventory as is reasonably practicable of all Deliverables and Services provided under the Contract, including Software, data, Equipment, materials, third party licenses, third party leases, and third party contracts used to provide the Services, as well as the location thereof, entities serviced under this Contract by such items, and such other information regarding such items as the State reasonably requests.

## 79. DISASTER RECOVERY AND SECURITY PLAN

Within ninety (90) calendar days after the Effective Date, Contractor shall develop and submit to the State, for the State's review, comment and approval, a detailed disaster recovery and security plan applicable to all of the Services ("**Disaster Recovery and Security Plan**"); provided, however, that to the extent any portions of the Disaster Recovery and Security Plan are developed prior to the expiration of such ninety (90) day period, Contractor shall deliver such portions to the State as soon as they are so developed. Except where agreed to by the State, such detailed Disaster Recovery and Security Plan shall be consistent in all respects with the requirements (if any) set forth in this Contract (including the RFP) and the Disaster Recovery and Security processes submitted by Contractor as part of the Proposal. Immediately upon the State's approval of the Disaster Recovery and Security Plan, Contractor shall implement the same in accordance with its provisions. Contractor shall ensure that the Disaster Recovery and Security Plan, and the corresponding disaster recovery and security Services provided by Contractor, shall be consistent with any limitations imposed by law and shall be appropriate and comprehensive, using industry best practices and methods and state-of-the-art technology, to at all times ensure the availability, security, integrity and confidentiality of the Deliverables and Services. At least thirty (30) calendar days prior to each anniversary of the Effective Date, Contractor shall revise the Disaster Recovery and Security Plan as appropriate to reflect any changes to the State's information-technology

service-providers to Contractor. The Term of this Contract shall commence on the Effective Date and shall continue until the end of the fifth (5<sup>th</sup>) anniversary of the Effective Date (the “**Term**”). In addition, the State may, at its sole option, elect to extend the Term for up to two (2) additional periods of one (1) year each. The State may exercise its option to extend by giving written notice of extension to Contractor prior to expiration of the Term. Contractor shall provide a reminder letter to the State ninety (90) calendar days prior to the end of the Term and each extension thereof if the State shall not have previously provided written notice to Contractor of its intent to extend the Contract prior to such dates.

## **82. SUBCONTRACTORS**

Except as reflected in Contractor’s Proposal, Contractor shall not subcontract all or any part of the Service without the prior written consent of the State, which will not be unreasonably withheld; provided, however, that Contractor may subcontract for internal infrastructure support, not specifically for this Contract, without notice to or consent from the State. Each subcontractor will perform only the specific Services described with regard to such subcontractor in a written request submitted by Contractor to the State when seeking such consent; and no change may be made to the specific Services performed by a particular subcontractor, and no substitution, replacement, or change of subcontractors may be made, without the advance written consent of the State, which will not be unreasonably withheld. All performance of Services by each subcontractor shall at all times be in accordance with the terms and conditions of this Contract. Contractor covenants that its arrangements with subcontractors shall not prohibit or restrict any such subcontractor from, at any time, entering into direct agreements with the State. The State’s consent with respect to Contractor’s use of a particular proposed subcontractor, shall be given or withheld in writing within Contractor’s reasonably requested timeframe, and, if such consent is withheld, the State’s notice thereof to Contractor shall set forth the reasons for such withholding of consent. If the State determines in good faith and in a commercially reasonable manner that the performance or conduct of any subcontractor is unsatisfactory, the State may notify Contractor of its determination in writing, indicating the reasons therefore, in which event Contractor shall promptly take all necessary actions to remedy the performance or conduct of such subcontractor or to replace such subcontractor by another third party or by Contractor personnel. Contractor shall be solely and exclusively responsible for supervising the activities and performance of each subcontractor. Contractor and each such subcontractor shall be jointly and severally responsible for any act or omission of such subcontractor engaged to provide Deliverables and Services under this Contract. Notwithstanding the fact that a subcontractor may be the party actually performing a particular Service or providing a particular Deliverable hereunder, Contractor shall at all times: (i) constitute the primary obligor for all of Contractor’s duties and obligations hereunder; and (ii) be liable and responsible as a principal for the performance of all of the duties and obligations of Contractor hereunder that Contractor may elect to subcontract to any of its subcontractors or to any other third party.

## **83. DE MINIMIS SERVICE REQUESTS**

Notwithstanding anything to the contrary provided in this Contract, if (i) the DTS/ONS at any time during the Term requests services, products, or resources from Contractor and the parties cannot agree as to whether such services, products, or resources are included as part of the Services offered under this

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modification of this Contract by the parties; provided, however, if the parties are unable to reach such mutual agreement within a reasonable period of time and good faith effort, then the State may take action pursuant to the terms and conditions of this Contract, including but not limited to terminating the affected Service(s) without penalty.

## **8. CONTRACTOR'S POWER AND AUTHORITY**

Contractor represents and warrants to the State that Contractor has full power and authority to grant the rights herein granted. Further, Contractor avers that it will not enter into any arrangement with any third party which might abridge any rights of the State under this Contract.

The Services provided by Contractor shall be under the control, management, and supervision of Contractor. Contractor is fully responsible for all work performed under this Contract including subcontracted work. Contractor is wholly responsible for the performance of its employees, agents, subcontractors and suppliers in fulfilling its obligations described in this Contract.

## **9. ASSIGNMENT**

This Contract shall not be assignable by Contractor in whole or in part without the prior written consent of the State, which will not be unreasonably withheld. —

## **10. WAIVER OF RIGHTS**

Any action or inaction by either party or the failure of either party on any occasion, to enforce any right or provision of the Contract, shall not be construed to be a waiver by such party of its rights hereunder and shall not prevent the parties from enforcing such provision or right on any future occasion. The rights and remedies of the parties herein are cumulative and are in addition to any other rights or remedies that the parties may have at law or in equity. A waiver by either of the parties hereto of any of the covenants to be performed by the other or any breach thereof shall not be construed to be a waiver of any succeeding breach thereof or of any other covenant herein contained. All waivers must be in writing and signed by the party waiving its rights.

## **11. ORDER OF PRECEDENCE**

In the event of any inconsistency between the articles, attachments, specifications or provisions which constitute this Contract, the following order of precedence shall apply:

- a. These General Provisions and any amendments thereto, including all of the attachments and Contract forms.
- b. The specifications and requirements contained in the RFP as incorporated herein and the agreements to meet the specifications and requirements in the RFP as stated in the Proposal. (The parties acknowledge and agree that silence in the Proposal with respect to a particular RFP specification or requirement equals consent by Contractor.)
- c. All other documents incorporated in the Contract by reference.
- d. All regulatory filings made pursuant to the terms and conditions of this Contract.

## **12. DELIVERY**

Contractor shall strictly adhere to the delivery and completion schedules specified in this Contract subject to Section 28. Time, if stated as a number of days, shall mean calendar days unless otherwise specified. If Contractor delivers in excess of the quantities or Services specified herein, the State shall not be required to make any payment for the excess Deliverables or Services, and may return them to Contractor at Contractor's expense or utilize any other rights available to the State at law or in equity.

## **13. SUBSTITUTIONS**

Substitution of Deliverables and Services may not be tendered without advance written consent of the State. The State will not unreasonably withhold its consent. Contractor shall not use any specification in lieu of those contained in the Contract without written consent of the State.

## **14. INSPECTION, ACCEPTANCE AND REJECTION**

Unless otherwise specified in the Contract:

- a. Contractor and its subcontractors will provide and maintain a quality assurance system mutually agreed upon by the Contractor and the State covering Deliverables and Services under this Contract and will tender to the State only those Deliverables and Services that have been inspected and found to conform to this Contract's requirements. Contractor will keep records consistent with the agreed upon quality assurance system, and will make these records available

effects of such harmful code, including restoration of any lost data using generally accepted data restoration methods.

- c. Contractor warrants that the Services shall be performed, and all Deliverables and other materials prepared and delivered, in a timely, professional, efficient, diligent and workman-like manner, in accordance with the highest recognized professional standards and practices of quality and integrity in the industry, by qualified personnel fully familiar with the technology and methodologies used in performing the Deliverables and Services, and be fit for use as reasonably intended by the parties.
- d. Contractor represents and warrants that, as of the Effective Date, there is no outstanding or reasonably anticipated civil or criminal litigation, arbitrated matter, or other dispute, in any forum, to which Contractor or any of its Affiliates is a party that, if decided unfavorably to Contractor or its Affiliates, would reasonably be expected to preclude Contractor from entering into this Contract or have a material adverse effect on Contractor's ability to fulfill its obligations hereunder.
- e. Contractor represents and warrants (i) all Equipment, networks, Software and other resources utilized or provided by Contractor in connection with the Deliverables and Services (collectively, the "**Provided Resources**") shall be successfully interfaced with, and shall be compatible with, the services, systems, items, and other resources of the State and its other third party service providers with which they will interoperate (collectively, the "**State Resources**"), and (ii) none of the Deliverables, Services or other items provided to the State by Contractor shall be adversely affected by, or shall adversely affect, the State Resources or any Services provided by any such third party service providers, in any material respect, whether as to functionality, speed, service levels, interconnectivity, reliability, availability, performance, response times, or otherwise.
- f. Contractor represents and warrants that: (i) it has conducted a full and complete analysis of the State's requirements as specified in this Contract; (ii) it has performed sufficient due diligence investigations regarding the scope and substance of the Services and the Deliverables; (iii) it has received sufficient answers to all questions that it has presented to the State regarding the scope and substance of the Services and the Deliverables as well as the workings, capabilities, procedures, and capacities of the State's networks, equipment, hardware, and software associated with the provision of the Services and Deliverables; and (iv) it is capable in all respects of providing the Services and Deliverables in accordance with this Contract. Contractor hereby waives and releases any and all claims that it now has or hereafter may have against the State based upon any inaccuracy or incompleteness of the information it has received with regard to the scope and substance of the Services and the Deliverables, except where such information was willfully withheld or intentionally misrepresented by the State and where such claims are permitted under California law. Further, Contractor covenants that it shall not seek any judicial rescission, cancellation, termination, reformation, or modification of this Contract or any provision hereof, nor any adjustment in the charges to be paid for the Deliverables or Services, based upon any such inaccuracy or incompleteness of information except where such information was willfully withheld or intentionally misrepresented by the State.
- g. Contractor represents and warrants that Contractor, at Contractor's expense, shall (and shall cause all of its subcontractors to) maintain all Equipment, Systems, networks, and Software operated or used in performance of its obligations hereunder so that they operate in accordance with the

- ii. Place no further subcontracts for materials, Services, or facilities, except as necessary to complete the continuing portion of the Contract.
  - iii. Terminate all subcontracts to the extent they relate to the work terminated.
  - iv. Settle all outstanding liabilities and settlement proposals arising from the termination of subcontracts.
- c. Contractor and the State agree that the State shall have no obligation to pay any amount to Contractor upon the termination for convenience, other than, and in accordance with the terms of this Contract, the agreed price for Deliverables or Services accepted by the State and not previously paid for, adjusted for any savings on freight and other charges plus any unrecovered amortized capital costs originally identified in writing by Contractor and approved in advance by the State, calculated using Generally Accepted Accounting Principles. Contractor shall submit a final termination settlement proposal within ninety (90) calendar days from the effective date of termination.

## **20. TERMINATION FOR DEFAULT**

- a. The State may, subject to the clause titled “Force Majeure” (Section 21) and to subsection d. below, by written notice of default to Contractor, terminate this Contract in whole or in part if Contractor fails to:
  - i. Deliver the Deliverables or perform the Services within the time specified in the Contract or any amendment thereto;
  - ii. Make progress, so that the lack of progress endangers performance of this Contract; or
  - iii. Perform in accordance with any of the other provisions of this Contract.
- b. The State’s right to terminate this Contract under subsection a. above, may be exercised if (i) the failure constitutes a material breach of this Contract and if Contractor does not cure such failure within the time frame stated in the State’s cure notice, which in no event will be less than thirty (30) calendar days, unless a shorter period is specifically set forth elsewhere under this Contract; or (ii) there are repeated or numerous failures by Contractor for which the State has provided notice, which collectively constitute a material breach of this Contract. Without limiting the generality of the foregoing, Contractor hereby agrees that each of the following events shall be deemed a material breach by Contractor:
  - i. Contractor’s failure to comply with its obligations under Sections 36.a, 77, 78, 83.a and/or 84;
  - ii. Submission of inaccurate reports or invoices that result in a material adverse financial impact on the State;



- iii. Any modifications or alterations to an Ordering Document, Individual Price Reduction Notification document, Authorization to Order Under State Contract or ICB Pricing documentation by Contractor that were not authorized or approved by the State;
  - iv. Contractor's refusal to provide Services and Deliverables requested hereunder pursuant to a proper Ordering or Individual Price Reduction Notification Document; and
  - v. Any efforts by Contractor, without the State's prior approval, to market to or otherwise solicit the following entities to enter into a separate agreement for deliverables and services that are the same or substantially similar to the Deliverables and Services: (a) an entity that and is receiving such particular Deliverables and Services under this Contract or (b) an entity that is mandated by the State to obtain Deliverables and Services pursuant to this Contract.
- c. If the State terminates this Contract in whole or in part pursuant to this Section, it may acquire from an alternative provider, under terms and in the manner the State considers appropriate, Deliverables or Services similar to those terminated, and Contractor will be liable to the State for the State's Cost to Cover (but subject to the clause entitled "Limitation of Liability" (Section 23)). However, Contractor shall continue to provide all Deliverables and Services not expressly terminated by the State.
- d. If the Contract is terminated for default, the State shall be entitled to require Contractor to, and Contractor shall, transfer title, or in the case of licensed Software, license, and deliver to the State, as directed by the State, any;
- i. Completed Deliverables, and
  - ii. Partially completed Deliverables.
- Upon direction of the State, Contractor shall also protect and preserve property in its possession in which the State has an interest.
- e. The State shall pay the agreed upon Contract price for completed Deliverables, partially completed Deliverables provided pursuant to subsection d. above, and Services delivered and accepted.
- f. If, after termination, it is determined by a final ruling in accordance with the dispute resolution process under this Contract that Contractor was not in default, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the State.
- g. The rights and remedies of the State in this clause are in addition to any other rights and remedies provided by law or under this Contract, and are subject to the clause titled "Limitation of Liability" (Section 23).
- h. Except as may be permitted or required under the United States Bankruptcy Code or Section 36.a, Contractor may not, for any reason whatsoever, terminate this Contract or otherwise repudiate this Contract or refuse to perform its obligations hereunder.

- e. If Contractor fails to provide Services in accordance with this Contract due to the occurrence of a force majeure event, all amounts payable to Contractor hereunder shall be equitably adjusted in a manner such that the State is not required to pay any amounts for Services that it is not receiving.
- f. Without limiting Contractor's obligations under this Contract, or impairing Contractor's emergency service and public safety priority requirements for its customers generally, whenever a force majeure event or disaster causes Contractor to allocate limited resources between or among its customers, the State shall receive at least the same treatment as comparable Contractor customers consistent with Contractor's obligations and duties for public safety emergency service priority response and restoration as required by applicable law and regulation and separate contractual obligations with emergency service providers.

## **22. RIGHTS AND REMEDIES OF STATE FOR DEFAULT**

- a. In the event any Deliverables furnished or Services provided by Contractor in the performance of the Contract should fail to conform to the requirements herein, the State may reject the same, and it shall become the duty of Contractor to reclaim and remove the Deliverable promptly or to correct the performance of the Services, without expense to the State, and immediately replace or re-perform all such rejected Deliverables or Services, as applicable, with others conforming to the Contract.
- b. In addition to any other rights and remedies the State may have, the State may require Contractor, at Contractor's expense, to ship Deliverables via air freight or expedited routing to avoid or minimize actual or potential delay if the delay is the fault of Contractor.
- c. In the event of the termination of this Contract, either in whole or in part, by reason of default or breach by Contractor, any loss or damage sustained by the State in procuring any items or Services which Contractor agreed to supply shall be borne and paid for by Contractor, subject to the Limitation of Liability included in this Contract.

## **23. LIMITATION OF LIABILITY**

- a. Contractor's liability for damages to the State for any cause whatsoever, and regardless of the form of action, whether in contract or in tort, shall be limited to \$100 Million, except as expressly set forth below.
- b. The State's liability for damages for any cause whatsoever, and regardless of the form of action, whether in contract or in tort, shall be limited to the total charges due and payable to Contractor hereunder that have not been paid to Contractor. Nothing herein shall be construed to waive or limit the State's sovereign immunity or any other immunity from suit provided by law.

- c. Neither Contractor nor the State will be liable for consequential, incidental, indirect, special, or punitive damages, even if notification has been given as to the possibility of such damages, except as expressly set forth below.
- d. Sections 23(a) and (c) will not apply to Contractor's liability for damages (i) to the extent that Contractor's liability for such damages is specifically set forth in the Statement of Work; (ii) in connection with liability under the provision, entitled "Patent, Copyright, and Trade Secret Protection" (Section 32) or to any other liability (including without limitation indemnification obligations) for infringement of third party Intellectual Property Rights; (iii) in connection with claims covered by any specific provision herein calling for performance deficiency charges; (iv) in connection with claims arising under provisions herein calling for indemnification for third party claims against the State for bodily injury to persons or damage to real or tangible personal property caused by Contractor's negligence or willful misconduct; (v) in connection with costs or attorneys' fees that the State becomes entitled to recover as a prevailing party in any action; (vi) in connection with breaches of Contractor's obligations of confidentiality; (vii) in connection with claims based upon a breach of Section 36.a hereof or upon any repudiation of this Contract by Contractor or Contractor's refusal to perform its duties and obligations hereunder; (viii) for Cost to Cover damages; (ix) in connection with Contractor's failure to perform its obligations under Section 21 in the event of a force majeure event; or (x) in connection with Contractor's failure to comply with the terms of Section 30.

## **24. CONTRACTOR'S LIABILITY FOR INJURY TO PERSONS OR DAMAGE TO PROPERTY**

- a. Contractor shall be liable for damages arising out of injury to person(s) and/or damage to the property of the State, employees of the State, or any other person(s) designated by the State for any purpose, prior to, during, or subsequent to delivery, installation, acceptance, and use of the Deliverables or Services either at Contractor's site or at the State's place of business, provided that the injury or damage was caused by the fault, negligence, or willful misconduct of Contractor.
- b. Contractor shall not be liable for damages solely arising out of or caused by an alteration or an Attachment not made or installed by Contractor, or for damage to alterations or Attachments that may result from the normal operation and maintenance of the Deliverables provided by Contractor during the Contract.

## **25. INDEMNIFICATION**

Contractor agrees to indemnify, defend and hold harmless the State, its officers, agents and employees from any and all third party claims, losses, damages, liabilities, costs and expenses (including without limitation reasonable attorneys' fees and costs), and losses due to the injury or death of any individual, or the loss or damage to any real or tangible personal property, resulting from the willful misconduct or negligent acts or omissions of Contractor or any of its agents, subcontractors, employees, suppliers, laborers, or any other person, firm, or corporation furnishing or supplying work, Deliverables, Services,

- i. Will receive a copy of the company's drug-free policy statement; and
- ii. Will agree to abide by the terms of the company's statement as a condition of employment on the Contract.

#### **44. FOUR-DIGIT DATE COMPLIANCE**

Contractor represents and warrants to the State that it will provide only Four-Digit Date Compliant (as defined below) Deliverables and/or Services to the State. **"Four Digit Date Compliant"** Deliverables and Services can accurately process, calculate, compare, and sequence date data, including without limitation date data arising out of or relating to leap years and changes in centuries. This warranty and representation is subject to the warranty terms and conditions of this Contract and does not limit the generality or warranty obligations set forth elsewhere herein.

#### **45. SWEATFREE CODE OF CONDUCT**

- a. Contractor declares under penalty of perjury that no Equipment, materials, or supplies furnished to the State pursuant to the Contract have been produced in whole or in part by sweatshop labor, forced labor, convict labor, indentured labor under penal sanction, abusive forms of child labor or exploitation of children in sweatshop labor, or with the benefit of sweatshop labor, forced labor, convict labor, indentured labor under penal sanction, abusive forms of child labor or exploitation of children in sweatshop labor. Contractor further declares under penalty of perjury that they adhere to the Sweatfree Code of Conduct as set forth on the California Department of Industrial Relations website located at <http://www.dir.ca.gov> and Public Contract Code Section 6108.
- b. Contractor agrees to cooperate fully in providing reasonable access to its records, documents, agents or employees, or premises if reasonably required by authorized officials of the State, the Department of Industrial Relations, or the Department of Justice to determine Contractor's compliance with the requirements under paragraph (a).

#### **46. RECYCLING**

Contractor shall certify in writing under penalty of perjury, the minimum, if not exact, percentage of post consumer material as defined in the Public Contract Code Section 12200, in products, materials, goods, or supplies offered or sold to the State regardless of whether the product meets the requirements of Section 12209. With respect to printer or duplication cartridges that comply with the requirements of Section 12156(e), the certification required by this section shall specify that the cartridges so comply (PCC 12205).

invoices the performance deficiency charge. If a cure to the State's satisfaction has not been achieved during the permitted cure period, the State may invoice Contractor for the performance deficiency charge(s). Contractor shall pay to the State or its designee all performance deficiency charges within thirty (30) calendar days of receipt of an invoice therefor. Notwithstanding the preceding sentence, Contractor may in good faith dispute that it failed to perform its obligations under this Contract with respect to the performance of administrative, reporting, and relationship management functions by providing written notice of such dispute. In the event of such a dispute, Section 35 will be followed prior to the Contractor being obligated to pay the disputed part of the invoice. Such performance deficiency charges shall constitute agreed fee reductions and not penalties or liquidated damages hereunder.

- b. Without limiting paragraph (a) of this Section: (i) the State has identified in RFP Section 4.5.10, Table 4A, certain amounts the State may assess as performance deficiency charges for certain situations (which may be modified from time to time upon agreement by the parties); and (ii) the parties presently anticipate that (a) DTS/ONS shall issue any invoices for performance deficiency charges and facilitate the meetings described in this Section, and (b) Contractor shall pay any performance deficiency charges to the entity identified by the State as the beneficiary of the Deliverables and Services to which the performance deficiency charges relate.
- c. Contractor shall provide all assistance and support reasonably necessary for the administration of such performance deficiency charges, including, the provision of additional documentation regarding Contractor's performance hereunder and the payment of the performance deficiency charges as directed by the State.
- d. Contractor may not earn back, with subsequent performance or otherwise, the amounts of any performance deficiency charges that become due the State.

## 51. SET-OFF RIGHTS

Notwithstanding anything to the contrary in this Contract, and in addition to the other rights of the State and/or the applicable Customer hereunder with respect to disputing invoices or withholding amounts, the State and/or the applicable Customer, in its sole discretion, may set off against any and all amounts otherwise payable to Contractor pursuant to any of the provisions of this Contract: (i) any and all amounts claimed by the State and/or the applicable Customer in good faith to be owed by Contractor to the State and/or the applicable Customer pursuant to any of the provisions of this Contract; and (ii) any and all amounts that the State and/or the applicable Customer believes in good faith that it does not owe to Contractor pursuant to any of the provisions of this Contract. Within twenty (20) calendar days after any such set-off by the State and/or applicable Customer, the State and/or applicable Customer shall provide Contractor with a written accounting of such set-off, a written statement of the reasons therefore, and a reasonable opportunity to meet and discuss the claimed set-off. In the event Contractor does not agree with the set-off applied, Contractor or applicable Customer may contact DTS/ONS to seek equitable resolution or exercise its right under applicable law. The escalation procedure beyond the project manager in Section 35 shall not apply.

improve Deliverables or Service items already being received by the State under this Contract, but instead add to the Deliverables or Service items additional material functionality and features, Contractor will make such Enhancements available to the State under this Contract and provide competitive pricing therefore unless Contractor in its sole discretion determines that the Enhancement would be provided at no additional charge. With each proposal to add an Enhancement, Contractor will provide a business case that includes potential users and market analysis that illustrates competitive pricing, if applicable. The State, in its sole discretion, shall determine whether to approve of such Enhancement's inclusion under this Contract. If the State chooses to proceed hereunder, the State and Contractor will negotiate in good faith to agree on the additional terms and conditions, if any, under which the Enhancement will be added to this Contract through amendment and Contractor shall update any applicable marketing plans used in connection with the provision of the Deliverables and Services hereunder. Contractor understands that DTS/ONS is fully responsible for this approval and agrees, absent written approval from DTS/ONS, Enhancements cannot be added to this Contract at the request of any State or non-State Agency. Consistent with and without limiting anything set forth in Section 57, nothing in this Section shall prohibit the State from pursuing or obtaining the same or similar Enhancements with or from its other providers of Module Services or requiring that certain Enhancements may only be obtained from certain providers of Module Services.

#### **69. PRICING AND SERVICE REVIEW**

For the purpose of maintaining competitiveness throughout the Term, Contractor agrees to joint review of its pricing and Service functionality annually, or more frequently (not to exceed three (3) such reviews in any twenty-four (24) month period unless otherwise agreed by the parties) at the State's request, to ensure the State and its Customers will receive cost-competitive and technologically competitive Services throughout the Term. Contractor agrees that written amendments to this Contract to reduce statewide rates and introduce technological Service improvements may be submitted throughout the Term.

#### **70. "MOST FAVORED NATION" STATUS OF STATE**

Contractor agrees to give the State and Customers of this Contract "Most Favored Nation" status, in that Contractor agrees that no other similarly situated public customer of Contractor or any of its Affiliates will receive rates for a substantially similar service, or suite of services, offered under substantially similar terms and conditions that are lower than the statewide rates provided hereunder when the volume of business from the other public customer is equal to or less than the volume of business the State delivers under this Contract. Contractor agrees to promptly bring to State's attention instances in which other public customers of Contractor or any of its Affiliates may receive lower rates for substantially similar services. If Contractor or its Affiliates offer lower rates to any other public customer for the same or a substantially similar service, or suite of services, offered under substantially similar terms and conditions, Contractor shall adjust the State's rates prospectively to match or beat such rates. If Contractor offers a bundled package of Deliverables and/or Services under substantially similar terms and conditions to other public Customers at a rate lower than the rate(s) charged to the State for such Deliverables and/or Services provided under this Contract, the State reserves the right to order a similarly bundled package of

Deliverables and/or Services at such lower rate. At the end of each Contract year, an executive level officer of Contractor shall certify in writing to the State that Contractor has complied with this provision. If Contractor is not in compliance with this Section, Contractor and the State shall make adjustments and/or payment as necessary and described above and in Section 50. Nothing herein shall be construed to require Contractor to offer, provision or sell Services in a manner that conflicts with applicable laws or regulations.

Rates established through the ICB and IPR processes described in Sections 71 and 72 respectively are exempt from this “Most Favored Nation” qualification.

## **71. INDIVIDUAL CASE BASIS (ICB) PRICING**

The State requires Contractor to list all Services in Attachment 3 and all Service pricing in Attachment 4. However, the State recognizes there may be instances where Contractor cannot anticipate or establish a specific cost for a Service because of issues such as complexity, facility availability, or other Service provisioning requirements. The State will consider the use of Individual Case Based Pricing only in specific situations and under the parameters detailed below:

- a. Contractor will provide documentation to the State that demonstrates that its ICB Pricing is developed through its corporate ICB process and is consistent with CPUC and other appropriate regulatory guidelines as applicable. Contractor further affirms that ICB Pricing opportunities will be offered in a consistent manner to all eligible Customers.
- b. ICB Pricing is a Customer specific pricing methodology approved by applicable regulatory agencies. The following components are examples of elements to be considered in developing an ICB Pricing methodology:
  - i. Capital investment required by Contractor, including the pro-rata share of existing capital and new incremental capital dedicated to the opportunity.
  - ii. Related expense to provide the Service, including expense such as installation, repair, billing, monitoring, on-going maintenance and other business and operating expense.

Contractor shall provide to the State a description of the components of its approved ICB Pricing methodology as part of the documentation required under subsection (a), above.

ICB Prices will only be offered if the prices are determined by Contractor and the State to be financially feasible and in the interest of the Customer. In the event a Customer requests Service that Contractor deems financially unfeasible, Contractor will provide the rationale for its decision and discuss other potential Service options with DTS/ONS before advising the Customer of the unavailability of ICB Prices.

ICB Pricing that is defined as a Managed Project shall be consistent with the terms and conditions of this Contract.

State all necessary additional Contractor personnel to accelerate performance as may be required or necessary to timely achieve compliance or, if Contractor has already failed to comply, achieve compliance within a re-adjusted time frame established by the State. Contractor shall have seven (7) calendar days, or longer if agreed to by the State in writing, to achieve compliance. For each material Disentanglement or Transition-Out requirement not completed after the notice of non-compliance period, the State shall be entitled to invoice Contractor for up to \$2,000 per day for each material deficiency, not to exceed \$10,000 per day for all deficiencies until Contractor is in material compliance with the requirements of the Transition-Out Plan. The Contractor may exercise its dispute rights under Section 35 above in the event that Contractor disagrees with the State's application of this Section; however, pending final resolution of any dispute, Contractor shall diligently proceed without disruption or delay with the performance of the Transition-Out Plan.

- e. Charges. All Disentanglement Services performed by Contractor during the transition shall be performed by Contractor at no additional cost to the State beyond what the State would pay for the Services. Unique services requested by the State will be priced as agreed upon by the parties.
- f. Delivery of State Data. Contractor shall provide to the State all State data and documentation and other information reasonably requested by the State in connection with the transition that is sufficient to enable the State, or another reasonably competent service provider, to fully assume the provision of any terminated Services. Except as Contractor is otherwise required to retain such data under this Contract or by law, Contractor shall destroy all copies of State data not turned over to the State.
- g. Inventory. To the extent applicable to the Services provided by Contractor hereunder, Contractor shall provide to the State as complete and accurate an inventory as is reasonably practicable of all Software, data, Equipment, materials, third party licenses, third party leases, and third party contracts used to provide the Services, as well as the location thereof, entities serviced under this Contract by such items, and such other information regarding such items as the State reasonably requests.
- h. Transfer of Assets. Effective as of the date of termination, Contractor shall, subject to Section 87, use commercially reasonable efforts to convey to the State (or its designee) such physical assets as the State may, in its sole discretion, select from among those assets that are onsite CPE and substructure not already fully paid for by the State and used by Contractor solely in or for the provision of Services to the State, excluding those assets expressly agreed upon by the parties in writing from time to time, at a price consisting of the aggregate net book value of such selected assets at that time, less the amount(s) already paid by the State for such assets.
- i. Transfer of Leases, Licenses and Contracts. Effective as of the date of termination, Contractor, at its expense, shall use commercially reasonable efforts to convey or assign to the State (or its designee) such leases, licenses, and other contracts as the State may, in its sole discretion, select from among those directly associated with the use of properties, Software, or other goods or services by Contractor that were specifically obtained, licensed or purchased in order for the State to obtain Services. Notwithstanding anything to the contrary in this Contract, Contractor shall be responsible for the satisfaction and performance of all obligations (including all financial obligations) under any such leases, licenses, and other contracts that may be assigned or conveyed to the State (or its designee) with respect to periods prior to the date of any such conveyance or assignment.



- j. License. Except as otherwise provided herein, Contractor shall use commercially reasonable efforts to assign or license to the State (or its designee) whatever rights Contractor possesses at the time of Disentanglement with regard to Software, materials and other items that are needed in order to allow the State (or its designee) to continue to perform and receive the benefit of the Services. To the extent allowed by the applicable owner or licensor and to the extent the following are accessible by Contractor, Contractor shall provide the State with a full and complete copy of each such item that constitutes Software, in such forms and media as reasonably requested by the State, together with all object code, source code, and then-available documentation thereto.

## 78. REPORTS, DATA AND INVENTORY

Contractor shall provide all reports required by this Contract or otherwise reasonably requested by the State. In addition to performing its obligations under Sections 77.f and 77.g as part of Disentanglement Services, upon the State's reasonable request, at reasonable intervals and for any reason related to the Contract and Services provided under the Contract, during the Term of the Contract, Contractor shall: (a) provide to the State all State data and documentation and all other information reasonably requested by the State; and (b) Contractor shall provide to the State as complete and accurate an inventory as is reasonably practicable of all Deliverables and Services provided under the Contract, including Software, data, Equipment, materials, third party licenses, third party leases, and third party contracts used to provide the Services, as well as the location thereof, entities serviced under this Contract by such items, and such other information regarding such items as the State reasonably requests.

## 79. DISASTER RECOVERY AND SECURITY PLAN

Within ninety (90) calendar days after the Effective Date, Contractor shall develop and submit to the State, for the State's review, comment and approval, a detailed disaster recovery and security plan applicable to all of the Services ("**Disaster Recovery and Security Plan**"); provided, however, that to the extent any portions of the Disaster Recovery and Security Plan are developed prior to the expiration of such ninety (90) day period, Contractor shall deliver such portions to the State as soon as they are so developed. Except where agreed to by the State, such detailed Disaster Recovery and Security Plan shall be consistent in all respects with the requirements (if any) set forth in this Contract (including the RFP) and the Disaster Recovery and Security processes submitted by Contractor as part of the Proposal. Immediately upon the State's approval of the Disaster Recovery and Security Plan, Contractor shall implement the same in accordance with its provisions. Contractor shall ensure that the Disaster Recovery and Security Plan, and the corresponding disaster recovery and security Services provided by Contractor, shall be consistent with any limitations imposed by law and shall be appropriate and comprehensive, using industry best practices and methods and state-of-the-art technology, to at all times ensure the availability, security, integrity and confidentiality of the Deliverables and Services. At least thirty (30) calendar days prior to each anniversary of the Effective Date, Contractor shall revise the Disaster Recovery and Security Plan as appropriate to reflect any changes to the State's information-technology

service-providers to Contractor. The Term of this Contract shall commence on the Effective Date and shall continue until the end of the fifth (5<sup>th</sup>) anniversary of the Effective Date (the “**Term**”). In addition, the State may, at its sole option, elect to extend the Term for up to two (2) additional periods of one (1) year each. The State may exercise its option to extend by giving written notice of extension to Contractor prior to expiration of the Term. Contractor shall provide a reminder letter to the State ninety (90) calendar days prior to the end of the Term and each extension thereof if the State shall not have previously provided written notice to Contractor of its intent to extend the Contract prior to such dates.

## **82. SUBCONTRACTORS**

Except as reflected in Contractor’s Proposal, Contractor shall not subcontract all or any part of the Service without the prior written consent of the State, which will not be unreasonably withheld; provided, however, that Contractor may subcontract for internal infrastructure support, not specifically for this Contract, without notice to or consent from the State. Each subcontractor will perform only the specific Services described with regard to such subcontractor in a written request submitted by Contractor to the State when seeking such consent; and no change may be made to the specific Services performed by a particular subcontractor, and no substitution, replacement, or change of subcontractors may be made, without the advance written consent of the State, which will not be unreasonably withheld. All performance of Services by each subcontractor shall at all times be in accordance with the terms and conditions of this Contract. Contractor covenants that its arrangements with subcontractors shall not prohibit or restrict any such subcontractor from, at any time, entering into direct agreements with the State. The State’s consent with respect to Contractor’s use of a particular proposed subcontractor, shall be given or withheld in writing within Contractor’s reasonably requested timeframe, and, if such consent is withheld, the State’s notice thereof to Contractor shall set forth the reasons for such withholding of consent. If the State determines in good faith and in a commercially reasonable manner that the performance or conduct of any subcontractor is unsatisfactory, the State may notify Contractor of its determination in writing, indicating the reasons therefore, in which event Contractor shall promptly take all necessary actions to remedy the performance or conduct of such subcontractor or to replace such subcontractor by another third party or by Contractor personnel. Contractor shall be solely and exclusively responsible for supervising the activities and performance of each subcontractor. Contractor and each such subcontractor shall be jointly and severally responsible for any act or omission of such subcontractor engaged to provide Deliverables and Services under this Contract. Notwithstanding the fact that a subcontractor may be the party actually performing a particular Service or providing a particular Deliverable hereunder, Contractor shall at all times: (i) constitute the primary obligor for all of Contractor’s duties and obligations hereunder; and (ii) be liable and responsible as a principal for the performance of all of the duties and obligations of Contractor hereunder that Contractor may elect to subcontract to any of its subcontractors or to any other third party.

## **83. DE MINIMIS SERVICE REQUESTS**

Notwithstanding anything to the contrary provided in this Contract, if (i) the DTS/ONS at any time during the Term requests services, products, or resources from Contractor and the parties cannot agree as to whether such services, products, or resources are included as part of the Services offered under this

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modification of this Contract by the parties; provided, however, if the parties are unable to reach such mutual agreement within a reasonable period of time and good faith effort, then the State may take action pursuant to the terms and conditions of this Contract, including but not limited to terminating the affected Service(s) without penalty.

## **8. CONTRACTOR'S POWER AND AUTHORITY**

Contractor represents and warrants to the State that Contractor has full power and authority to grant the rights herein granted. Further, Contractor avers that it will not enter into any arrangement with any third party which might abridge any rights of the State under this Contract.

The Services provided by Contractor shall be under the control, management, and supervision of Contractor. Contractor is fully responsible for all work performed under this Contract including subcontracted work. Contractor is wholly responsible for the performance of its employees, agents, subcontractors and suppliers in fulfilling its obligations described in this Contract.

## **9. ASSIGNMENT**

This Contract shall not be assignable by Contractor in whole or in part without the prior written consent of the State, which will not be unreasonably withheld.

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## **10. WAIVER OF RIGHTS**

Any action or inaction by either party or the failure of either party on any occasion, to enforce any right or provision of the Contract, shall not be construed to be a waiver by such party of its rights hereunder and shall not prevent the parties from enforcing such provision or right on any future occasion. The rights and remedies of the parties herein are cumulative and are in addition to any other rights or remedies that the parties may have at law or in equity. A waiver by either of the parties hereto of any of the covenants to be performed by the other or any breach thereof shall not be construed to be a waiver of any succeeding breach thereof or of any other covenant herein contained. All waivers must be in writing and signed by the party waiving its rights.

## **11. ORDER OF PRECEDENCE**

In the event of any inconsistency between the articles, attachments, specifications or provisions which constitute this Contract, the following order of precedence shall apply:

- a. These General Provisions and any amendments thereto, including all of the attachments and Contract forms.
- b. The specifications and requirements contained in the RFP as incorporated herein and the agreements to meet the specifications and requirements in the RFP as stated in the Proposal. (The parties acknowledge and agree that silence in the Proposal with respect to a particular RFP specification or requirement equals consent by Contractor.)
- c. All other documents incorporated in the Contract by reference.
- d. All regulatory filings made pursuant to the terms and conditions of this Contract.

## **12. DELIVERY**

Contractor shall strictly adhere to the delivery and completion schedules specified in this Contract subject to Section 28. Time, if stated as a number of days, shall mean calendar days unless otherwise specified. If Contractor delivers in excess of the quantities or Services specified herein, the State shall not be required to make any payment for the excess Deliverables or Services, and may return them to Contractor at Contractor's expense or utilize any other rights available to the State at law or in equity.

## **13. SUBSTITUTIONS**

Substitution of Deliverables and Services may not be tendered without advance written consent of the State. The State will not unreasonably withhold its consent. Contractor shall not use any specification in lieu of those contained in the Contract without written consent of the State.

## **14. INSPECTION, ACCEPTANCE AND REJECTION**

Unless otherwise specified in the Contract:

- a. Contractor and its subcontractors will provide and maintain a quality assurance system mutually agreed upon by the Contractor and the State covering Deliverables and Services under this Contract and will tender to the State only those Deliverables and Services that have been inspected and found to conform to this Contract's requirements. Contractor will keep records consistent with the agreed upon quality assurance system, and will make these records available

effects of such harmful code, including restoration of any lost data using generally accepted data restoration methods.

- c. Contractor warrants that the Services shall be performed, and all Deliverables and other materials prepared and delivered, in a timely, professional, efficient, diligent and workman-like manner, in accordance with the highest recognized professional standards and practices of quality and integrity in the industry, by qualified personnel fully familiar with the technology and methodologies used in performing the Deliverables and Services, and be fit for use as reasonably intended by the parties.
- d. Contractor represents and warrants that, as of the Effective Date, there is no outstanding or reasonably anticipated civil or criminal litigation, arbitrated matter, or other dispute, in any forum, to which Contractor or any of its Affiliates is a party that, if decided unfavorably to Contractor or its Affiliates, would reasonably be expected to preclude Contractor from entering into this Contract or have a material adverse effect on Contractor's ability to fulfill its obligations hereunder.
- e. Contractor represents and warrants (i) all Equipment, networks, Software and other resources utilized or provided by Contractor in connection with the Deliverables and Services (collectively, the "**Provided Resources**") shall be successfully interfaced with, and shall be compatible with, the services, systems, items, and other resources of the State and its other third party service providers with which they will interoperate (collectively, the "**State Resources**"), and (ii) none of the Deliverables, Services or other items provided to the State by Contractor shall be adversely affected by, or shall adversely affect, the State Resources or any Services provided by any such third party service providers, in any material respect, whether as to functionality, speed, service levels, interconnectivity, reliability, availability, performance, response times, or otherwise.
- f. Contractor represents and warrants that: (i) it has conducted a full and complete analysis of the State's requirements as specified in this Contract; (ii) it has performed sufficient due diligence investigations regarding the scope and substance of the Services and the Deliverables; (iii) it has received sufficient answers to all questions that it has presented to the State regarding the scope and substance of the Services and the Deliverables as well as the workings, capabilities, procedures, and capacities of the State's networks, equipment, hardware, and software associated with the provision of the Services and Deliverables; and (iv) it is capable in all respects of providing the Services and Deliverables in accordance with this Contract. Contractor hereby waives and releases any and all claims that it now has or hereafter may have against the State based upon any inaccuracy or incompleteness of the information it has received with regard to the scope and substance of the Services and the Deliverables, except where such information was willfully withheld or intentionally misrepresented by the State and where such claims are permitted under California law. Further, Contractor covenants that it shall not seek any judicial rescission, cancellation, termination, reformation, or modification of this Contract or any provision hereof, nor any adjustment in the charges to be paid for the Deliverables or Services, based upon any such inaccuracy or incompleteness of information except where such information was willfully withheld or intentionally misrepresented by the State.
- g. Contractor represents and warrants that Contractor, at Contractor's expense, shall (and shall cause all of its subcontractors to) maintain all Equipment, Systems, networks, and Software operated or used in performance of its obligations hereunder so that they operate in accordance with the

- ii. Place no further subcontracts for materials, Services, or facilities, except as necessary to complete the continuing portion of the Contract.
  - iii. Terminate all subcontracts to the extent they relate to the work terminated.
  - iv. Settle all outstanding liabilities and settlement proposals arising from the termination of subcontracts.
- c. Contractor and the State agree that the State shall have no obligation to pay any amount to Contractor upon the termination for convenience, other than, and in accordance with the terms of this Contract, the agreed price for Deliverables or Services accepted by the State and not previously paid for, adjusted for any savings on freight and other charges plus any unrecovered amortized capital costs originally identified in writing by Contractor and approved in advance by the State, calculated using Generally Accepted Accounting Principles. Contractor shall submit a final termination settlement proposal within ninety (90) calendar days from the effective date of termination.

## **20. TERMINATION FOR DEFAULT**

- a. The State may, subject to the clause titled “Force Majeure” (Section 21) and to subsection d. below, by written notice of default to Contractor, terminate this Contract in whole or in part if Contractor fails to:
- i. Deliver the Deliverables or perform the Services within the time specified in the Contract or any amendment thereto;
  - ii. Make progress, so that the lack of progress endangers performance of this Contract; or
  - iii. Perform in accordance with any of the other provisions of this Contract.
- b. The State’s right to terminate this Contract under subsection a. above, may be exercised if (i) the failure constitutes a material breach of this Contract and if Contractor does not cure such failure within the time frame stated in the State’s cure notice, which in no event will be less than thirty (30) calendar days, unless a shorter period is specifically set forth elsewhere under this Contract; or (ii) there are repeated or numerous failures by Contractor for which the State has provided notice, which collectively constitute a material breach of this Contract. Without limiting the generality of the foregoing, Contractor hereby agrees that each of the following events shall be deemed a material breach by Contractor:
- i. Contractor’s failure to comply with its obligations under Sections 36.a, 77, 78, 83.a and/or 84;
  - ii. Submission of inaccurate reports or invoices that result in a material adverse financial impact on the State;

- iii. Any modifications or alterations to an Ordering Document, Individual Price Reduction Notification document, Authorization to Order Under State Contract or ICB Pricing documentation by Contractor that were not authorized or approved by the State;
  - iv. Contractor's refusal to provide Services and Deliverables requested hereunder pursuant to a proper Ordering or Individual Price Reduction Notification Document; and
  - v. Any efforts by Contractor, without the State's prior approval, to market to or otherwise solicit the following entities to enter into a separate agreement for deliverables and services that are the same or substantially similar to the Deliverables and Services: (a) an entity that is receiving such particular Deliverables and Services under this Contract or (b) an entity that is mandated by the State to obtain Deliverables and Services pursuant to this Contract.
- c. If the State terminates this Contract in whole or in part pursuant to this Section, it may acquire from an alternative provider, under terms and in the manner the State considers appropriate, Deliverables or Services similar to those terminated, and Contractor will be liable to the State for the State's Cost to Cover (but subject to the clause entitled "Limitation of Liability" (Section 23)). However, Contractor shall continue to provide all Deliverables and Services not expressly terminated by the State.
- d. If the Contract is terminated for default, the State shall be entitled to require Contractor to, and Contractor shall, transfer title, or in the case of licensed Software, license, and deliver to the State, as directed by the State, any;
- i. Completed Deliverables, and
  - ii. Partially completed Deliverables.
- Upon direction of the State, Contractor shall also protect and preserve property in its possession in which the State has an interest.
- e. The State shall pay the agreed upon Contract price for completed Deliverables, partially completed Deliverables provided pursuant to subsection d. above, and Services delivered and accepted.
- f. If, after termination, it is determined by a final ruling in accordance with the dispute resolution process under this Contract that Contractor was not in default, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the State.
- g. The rights and remedies of the State in this clause are in addition to any other rights and remedies provided by law or under this Contract, and are subject to the clause titled "Limitation of Liability" (Section 23).
- h. Except as may be permitted or required under the United States Bankruptcy Code or Section 36.a, Contractor may not, for any reason whatsoever, terminate this Contract or otherwise repudiate this Contract or refuse to perform its obligations hereunder.



- e. If Contractor fails to provide Services in accordance with this Contract due to the occurrence of a force majeure event, all amounts payable to Contractor hereunder shall be equitably adjusted in a manner such that the State is not required to pay any amounts for Services that it is not receiving.
- f. Without limiting Contractor's obligations under this Contract, or impairing Contractor's emergency service and public safety priority requirements for its customers generally, whenever a force majeure event or disaster causes Contractor to allocate limited resources between or among its customers, the State shall receive at least the same treatment as comparable Contractor customers consistent with Contractor's obligations and duties for public safety emergency service priority response and restoration as required by applicable law and regulation and separate contractual obligations with emergency service providers.

## **22. RIGHTS AND REMEDIES OF STATE FOR DEFAULT**

- a. In the event any Deliverables furnished or Services provided by Contractor in the performance of the Contract should fail to conform to the requirements herein, the State may reject the same, and it shall become the duty of Contractor to reclaim and remove the Deliverable promptly or to correct the performance of the Services, without expense to the State, and immediately replace or re-perform all such rejected Deliverables or Services, as applicable, with others conforming to the Contract.
- b. In addition to any other rights and remedies the State may have, the State may require Contractor, at Contractor's expense, to ship Deliverables via air freight or expedited routing to avoid or minimize actual or potential delay if the delay is the fault of Contractor.
- c. In the event of the termination of this Contract, either in whole or in part, by reason of default or breach by Contractor, any loss or damage sustained by the State in procuring any items or Services which Contractor agreed to supply shall be borne and paid for by Contractor, subject to the Limitation of Liability included in this Contract.

## **23. LIMITATION OF LIABILITY**

- a. Contractor's liability for damages to the State for any cause whatsoever, and regardless of the form of action, whether in contract or in tort, shall be limited to \$50 Million, except as expressly set forth below.
- b. The State's liability for damages for any cause whatsoever, and regardless of the form of action, whether in contract or in tort, shall be limited to the total charges due and payable to Contractor hereunder that have not been paid to Contractor. Nothing herein shall be construed to waive or limit the State's sovereign immunity or any other immunity from suit provided by law.

- c. Neither Contractor nor the State will be liable for consequential, incidental, indirect, special, or punitive damages, even if notification has been given as to the possibility of such damages, except as expressly set forth below.
- d. Sections 23(a) and (c) will not apply to Contractor's liability for damages (i) to the extent that Contractor's liability for such damages is specifically set forth in the Statement of Work; (ii) in connection with liability under the provision, entitled "Patent, Copyright, and Trade Secret Protection" (Section 32) or to any other liability (including without limitation indemnification obligations) for infringement of third party Intellectual Property Rights; (iii) in connection with claims covered by any specific provision herein calling for performance deficiency charges; (iv) in connection with claims arising under provisions herein calling for indemnification for third party claims against the State for bodily injury to persons or damage to real or tangible personal property caused by Contractor's negligence or willful misconduct; (v) in connection with costs or attorneys' fees that the State becomes entitled to recover as a prevailing party in any action; (vi) in connection with breaches of Contractor's obligations of confidentiality; (vii) in connection with claims based upon a breach of Section 36.a hereof or upon any repudiation of this Contract by Contractor or Contractor's refusal to perform its duties and obligations hereunder; (viii) for Cost to Cover damages; (ix) in connection with Contractor's failure to perform its obligations under Section 21 in the event of a force majeure event; or (x) in connection with Contractor's failure to comply with the terms of Section 30.

## **24. CONTRACTOR'S LIABILITY FOR INJURY TO PERSONS OR DAMAGE TO PROPERTY**

- a. Contractor shall be liable for damages arising out of injury to person(s) and/or damage to the property of the State, employees of the State, or any other person(s) designated by the State for any purpose, prior to, during, or subsequent to delivery, installation, acceptance, and use of the Deliverables or Services either at Contractor's site or at the State's place of business, provided that the injury or damage was caused by the fault, negligence, or willful misconduct of Contractor.
- b. Contractor shall not be liable for damages solely arising out of or caused by an alteration or an Attachment not made or installed by Contractor, or for damage to alterations or Attachments that may result from the normal operation and maintenance of the Deliverables provided by Contractor during the Contract.

## **25. INDEMNIFICATION**

Contractor agrees to indemnify, defend and hold harmless the State, its officers, agents and employees from any and all third party claims, losses, damages, liabilities, costs and expenses (including without limitation reasonable attorneys' fees and costs), and losses due to the injury or death of any individual, or the loss or damage to any real or tangible personal property, resulting from the willful misconduct or negligent acts or omissions of Contractor or any of its agents, subcontractors, employees, suppliers, laborers, or any other person, firm, or corporation furnishing or supplying work, Deliverables, Services,

**44. FOUR-DIGIT DATE COMPLIANCE**

Contractor represents and warrants to the State that it will provide only Four-Digit Date Compliant (as defined below) Deliverables and/or Services to the State. “**Four Digit Date Compliant**” Deliverables and Services can accurately process, calculate, compare, and sequence date data, including without limitation date data arising out of or relating to leap years and changes in centuries. This warranty and representation is subject to the warranty terms and conditions of this Contract and does not limit the generality or warranty obligations set forth elsewhere herein.

**45. SWEATFREE CODE OF CONDUCT**

- a. Contractor declares under penalty of perjury that no Equipment, materials, or supplies furnished to the State pursuant to the Contract have been produced in whole or in part by sweatshop labor, forced labor, convict labor, indentured labor under penal sanction, abusive forms of child labor or exploitation of children in sweatshop labor, or with the benefit of sweatshop labor, forced labor, convict labor, indentured labor under penal sanction, abusive forms of child labor or exploitation of children in sweatshop labor. Contractor further declares under penalty of perjury that they adhere to the Sweatfree Code of Conduct as set forth on the California Department of Industrial Relations website located at <http://www.dir.ca.gov> and Public Contract Code Section 6108.
- b. Contractor agrees to cooperate fully in providing reasonable access to its records, documents, agents or employees, or premises if reasonably required by authorized officials of the State, the Department of Industrial Relations, or the Department of Justice to determine Contractor's compliance with the requirements under paragraph (a).

**46. RECYCLING**

Contractor shall certify in writing under penalty of perjury, the minimum, if not exact, percentage of post consumer material as defined in the Public Contract Code Section 12200, in products, materials, goods, or supplies offered or sold to the State regardless of whether the product meets the requirements of Section 12209. With respect to printer or duplication cartridges that comply with the requirements of Section 12156(e), the certification required by this section shall specify that the cartridges so comply (PCC 12205).

**47. CHILD SUPPORT COMPLIANCE ACT**

For any Contract in excess of \$100,000, Contractor acknowledges in accordance with Public Contract Code Section 7110, that:

- a. Contractor recognizes the importance of child and family support obligations and shall fully comply with all applicable State and federal laws relating to child and family support

Section 35 will be followed prior to the Contractor being obligated to pay the disputed part of the invoice. Such performance deficiency charges shall constitute agreed fee reductions and not penalties or liquidated damages hereunder.

- b. Without limiting paragraph (a) of this Section: (i) the State has identified in RFP Section 4.5.10, Table 4A, certain amounts the State may assess as performance deficiency charges for certain situations (which may be modified from time to time upon agreement by the parties); and (ii) the parties presently anticipate that (a) DTS/ONS shall issue any invoices for performance deficiency charges and facilitate the meetings described in this Section, and (b) Contractor shall pay any performance deficiency charges to the entity identified by the State as the beneficiary of the Deliverables and Services to which the performance deficiency charges relate.
- c. Contractor shall provide all assistance and support reasonably necessary for the administration of such performance deficiency charges, including, the provision of additional documentation regarding Contractor's performance hereunder and the payment of the performance deficiency charges as directed by the State.
- d. Contractor may not earn back, with subsequent performance or otherwise, the amounts of any performance deficiency charges that become due the State.

## **51. SET-OFF RIGHTS**

Notwithstanding anything to the contrary in this Contract, and in addition to the other rights of the State and/or the applicable Customer hereunder with respect to disputing invoices or withholding amounts, the State and/or the applicable Customer, in its sole discretion, may set off against any and all amounts otherwise payable to Contractor pursuant to any of the provisions of this Contract: (i) any and all amounts claimed by the State and/or the applicable Customer in good faith to be owed by Contractor to the State and/or the applicable Customer pursuant to any of the provisions of this Contract; and (ii) any and all amounts that the State and/or the applicable Customer believes in good faith that it does not owe to Contractor pursuant to any of the provisions of this Contract. Within twenty (20) calendar days after any such set-off by the State and/or applicable Customer, the State and/or applicable Customer shall provide Contractor with a written accounting of such set-off, a written statement of the reasons therefore, and a reasonable opportunity to meet and discuss the claimed set-off. In the event Contractor does not agree with the set-off applied, Contractor or applicable Customer may contact DTS/ONS to seek equitable resolution or exercise its right under applicable law. The escalation procedure beyond the project manager in Section 35 shall not apply.

## **52. CONTRACTOR PERSONNEL**

- a. When Contractor needs access to State's premises to perform the required Services under this Contract, Contractor personnel shall perform their duties during State's regular work days and normal work hours, except as may be specifically agreed to otherwise by the State and Contractor.

## **69. PRICING AND SERVICE REVIEW**

For the purpose of maintaining competitiveness throughout the Term, Contractor agrees to joint review of its pricing and Service functionality annually, or more frequently (not to exceed three (3) such reviews in any twenty-four (24) month period unless otherwise agreed by the parties) at the State's request, to ensure the State and its Customers will receive cost-competitive and technologically competitive Services throughout the Term. Contractor agrees that written amendments to this Contract to reduce statewide rates and introduce technological Service improvements may be submitted throughout the Term.

## **70. "MOST FAVORED NATION" STATUS OF STATE**

Contractor agrees to give the State and Customers of this Contract "Most Favored Nation" status, in that Contractor agrees that no other similarly situated public customer of Contractor or any of its Affiliates will receive rates for a substantially similar service, or suite of services, offered under substantially similar terms and conditions that are lower than the statewide rates provided hereunder when the volume of business from the other public customer is equal to or less than the volume of business the State delivers under this Contract. Contractor agrees to promptly bring to State's attention instances in which other public customers of Contractor or any of its Affiliates may receive lower rates for substantially similar services. If Contractor or its Affiliates offer lower rates to any other public customer for the same or a substantially similar service, or suite of services, offered under substantially similar terms and conditions, Contractor shall adjust the State's rates prospectively to match or beat such rates. If Contractor offers a bundled package of Deliverables and/or Services under substantially similar terms and conditions to other public Customers at a rate lower than the rate(s) charged to the State for such Deliverables and/or Services provided under this Contract, the State reserves the right to order a similarly bundled package of Deliverables and/or Services at such lower rate. At the end of each Contract year, an executive level officer of Contractor shall certify in writing to the State that Contractor has complied with this provision. If Contractor is not in compliance with this Section, Contractor and the State shall make adjustments and/or payment as necessary and described above and in Section 50. Nothing herein shall be construed to require Contractor to offer, provision or sell Services in a manner that conflicts with applicable laws or regulations.

Rates established through the ICB and IPR processes described in Sections 71 and 72 respectively are exempt from this "Most Favored Nation" qualification.

## **71. INDIVIDUAL CASE BASIS (ICB) PRICING**

The State requires Contractor to list all Services in Attachment 3 and all Service pricing in Attachment 4. However, the State recognizes there may be instances where Contractor cannot anticipate or establish a specific cost for a Service because of issues such as complexity, facility availability, or other Service provisioning requirements. The State will consider the use of Individual Case Based Pricing only in specific situations and under the parameters detailed below:

- f. Delivery of State Data. Contractor shall provide to the State all State data and documentation and other information reasonably requested by the State in connection with the transition that is sufficient to enable the State, or another reasonably competent service provider, to fully assume the provision of any terminated Services. Except as Contractor is otherwise required to retain such data under this Contract or by law, Contractor shall destroy all copies of State data not turned over to the State.
- g. Inventory. To the extent applicable to the Services provided by Contractor hereunder, Contractor shall provide to the State as complete and accurate an inventory as is reasonably practicable of all Software, data, Equipment, materials, third party licenses, third party leases, and third party contracts used to provide the Services, as well as the location thereof, entities serviced under this Contract by such items, and such other information regarding such items as the State reasonably requests.
- h. Transfer of Assets. Effective as of the date of termination, Contractor shall, subject to Section 87, use commercially reasonable efforts to convey to the State (or its designee) such physical assets as the State may, in its sole discretion, select from among those assets that are onsite CPE and substructure not already fully paid for by the State and used by Contractor solely in or for the provision of Services to the State, excluding those assets expressly agreed upon by the parties in writing from time to time, at a price consisting of the aggregate net book value of such selected assets at that time, less the amount(s) already paid by the State for such assets.
- i. Transfer of Leases, Licenses and Contracts. Effective as of the date of termination, Contractor, at its expense, shall use commercially reasonable efforts to convey or assign to the State (or its designee) such leases, licenses, and other contracts as the State may, in its sole discretion, select from among those directly associated with the use of properties, Software, or other goods or services by Contractor that were specifically obtained, licensed or purchased in order for the State to obtain Services. Notwithstanding anything to the contrary in this Contract, Contractor shall be responsible for the satisfaction and performance of all obligations (including all financial obligations) under any such leases, licenses, and other contracts that may be assigned or conveyed to the State (or its designee) with respect to periods prior to the date of any such conveyance or assignment.
- j. License. Except as otherwise provided herein, Contractor shall use commercially reasonable efforts to assign or license to the State (or its designee) whatever rights Contractor possesses at the time of Disentanglement with regard to Software, materials and other items that are needed in order to allow the State (or its designee) to continue to perform and receive the benefit of the Services. To the extent allowed by the applicable owner or licensor and to the extent the following are accessible by Contractor, Contractor shall provide the State with a full and complete copy of each such item that constitutes Software, in such forms and media as reasonably requested by the State, together with all object code, source code, and then-available documentation thereto.

## 78. REPORTS, DATA AND INVENTORY

Contractor shall provide all reports required by this Contract or otherwise reasonably requested by the State. In addition to performing its obligations under Sections 77.f and 77.g as part of Disentanglement Services, upon the State's reasonable request, at reasonable intervals and for any reason related to the Contract and Services provided under the Contract, during the Term of the Contract, Contractor shall: (a) provide to the State all State data and documentation and all other information reasonably requested by the State; and (b) Contractor shall provide to the State as complete and accurate an inventory as is reasonably practicable of all Deliverables and Services provided under the Contract, including Software, data, Equipment, materials, third party licenses, third party leases, and third party contracts used to provide the Services, as well as the location thereof, entities serviced under this Contract by such items, and such other information regarding such items as the State reasonably requests.

## 79. DISASTER RECOVERY AND SECURITY PLAN

Within ninety (90) calendar days after the Effective Date, Contractor shall develop and submit to the State, for the State's review, comment and approval, a detailed disaster recovery and security plan applicable to all of the Services ("**Disaster Recovery and Security Plan**"); provided, however, that to the extent any portions of the Disaster Recovery and Security Plan are developed prior to the expiration of such ninety (90) day period, Contractor shall deliver such portions to the State as soon as they are so developed. Except where agreed to by the State, such detailed Disaster Recovery and Security Plan shall be consistent in all respects with the requirements (if any) set forth in this Contract (including the RFP) and the Disaster Recovery and Security processes submitted by Contractor as part of the Proposal. Immediately upon the State's approval of the Disaster Recovery and Security Plan, Contractor shall implement the same in accordance with its provisions. Contractor shall ensure that the Disaster Recovery and Security Plan, and the corresponding disaster recovery and security Services provided by Contractor, shall be consistent with any limitations imposed by law and shall be appropriate and comprehensive, using industry best practices and methods and state-of-the-art technology, to at all times ensure the availability, security, integrity and confidentiality of the Deliverables and Services. At least thirty (30) calendar days prior to each anniversary of the Effective Date, Contractor shall revise the Disaster Recovery and Security Plan as appropriate to reflect any changes to the State's information-technology and/or telecommunications environment or requirements and submit it to the State for review, comment, and approval.

## 80. BENCHMARKING

Beginning twelve (12) months after the Effective Date and annually thereafter until any termination or expiration, the State may engage an independent third party (a "**Benchmark**er"), to benchmark Service(s), suite(s) of Services, Service Level Agreements, and/or the charges (other than ICB Pricing and IPR) hereunder. The cost for such benchmarking shall be equally shared by the State and Contractor. The selection of the Benchmarker shall be made by the State, subject to Contractor's approval, such approval not to be unreasonably withheld. In addition to the annual benchmarking activity, the State shall

## 82. SUBCONTRACTORS

Except as reflected in Contractor's Proposal, Contractor shall not subcontract all or any part of the Service without the prior written consent of the State, which will not be unreasonably withheld; provided, however, that Contractor may subcontract for internal infrastructure support, not specifically for this Contract, without notice to or consent from the State. Each subcontractor will perform only the specific Services described with regard to such subcontractor in a written request submitted by Contractor to the State when seeking such consent; and no change may be made to the specific Services performed by a particular subcontractor, and no substitution, replacement, or change of subcontractors may be made, without the advance written consent of the State, which will not be unreasonably withheld. All performance of Services by each subcontractor shall at all times be in accordance with the terms and conditions of this Contract. Contractor covenants that its arrangements with subcontractors shall not prohibit or restrict any such subcontractor from, at any time, entering into direct agreements with the State. The State's consent with respect to Contractor's use of a particular proposed subcontractor, shall be given or withheld in writing within Contractor's reasonably requested timeframe, and, if such consent is withheld, the State's notice thereof to Contractor shall set forth the reasons for such withholding of consent. If the State determines in good faith and in a commercially reasonable manner that the performance or conduct of any subcontractor is unsatisfactory, the State may notify Contractor of its determination in writing, indicating the reasons therefore, in which event Contractor shall promptly take all necessary actions to remedy the performance or conduct of such subcontractor or to replace such subcontractor by another third party or by Contractor personnel. Contractor shall be solely and exclusively responsible for supervising the activities and performance of each subcontractor. Contractor and each such subcontractor shall be jointly and severally responsible for any act or omission of such subcontractor engaged to provide Deliverables and Services under this Contract. Notwithstanding the fact that a subcontractor may be the party actually performing a particular Service or providing a particular Deliverable hereunder, Contractor shall at all times: (i) constitute the primary obligor for all of Contractor's duties and obligations hereunder; and (ii) be liable and responsible as a principal for the performance of all of the duties and obligations of Contractor hereunder that Contractor may elect to subcontract to any of its subcontractors or to any other third party.

## 83. DE MINIMIS SERVICE REQUESTS

Notwithstanding anything to the contrary provided in this Contract, if (i) the DTS/ONS at any time during the Term requests services, products, or resources from Contractor and the parties cannot agree as to whether such services, products, or resources are included as part of the Services offered under this Contract, and (ii) the financial impact on Contractor of satisfying such request is less than Twenty-Five Thousand Dollars (\$25,000.00), then to the extent that the cumulative and aggregate amount of all such services, products, or resources so provided does not result in a financial impact on Contractor in excess of One Hundred Thousand Dollars (\$100,000.00) during any contract year: (a) such failure to agree shall not be deemed a disagreement; (b) such request shall be deemed a request for Services; and (c) all such services, products, or resources shall be provided to the State by Contractor in accordance with the terms of this Contract.



# Module 4

modification of this Contract by the parties; provided, however, if the parties are unable to reach such mutual agreement within a reasonable period of time and good faith effort, then the State may take action pursuant to the terms and conditions of this Contract, including but not limited to terminating the affected Service(s) without penalty.

## **8. CONTRACTOR'S POWER AND AUTHORITY**

Contractor represents and warrants to the State that Contractor has full power and authority to grant the rights herein granted. Further, Contractor avers that it will not enter into any arrangement with any third party which might abridge any rights of the State under this Contract.

The Services provided by Contractor shall be under the control, management, and supervision of Contractor. Contractor is fully responsible for all work performed under this Contract including subcontracted work. Contractor is wholly responsible for the performance of its employees, agents, subcontractors and suppliers in fulfilling its obligations described in this Contract.

## **9. ASSIGNMENT**

This Contract shall not be assignable by Contractor in whole or in part without the prior written consent of the State, which will not be unreasonably withheld.

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## **10. WAIVER OF RIGHTS**

Any action or inaction by either party or the failure of either party on any occasion, to enforce any right or provision of the Contract, shall not be construed to be a waiver by such party of its rights hereunder and shall not prevent the parties from enforcing such provision or right on any future occasion. The rights and remedies of the parties herein are cumulative and are in addition to any other rights or remedies that the parties may have at law or in equity. A waiver by either of the parties hereto of any of the covenants to be performed by the other or any breach thereof shall not be construed to be a waiver of any succeeding breach thereof or of any other covenant herein contained. All waivers must be in writing and signed by the party waiving its rights.

## 11. ORDER OF PRECEDENCE

In the event of any inconsistency between the articles, attachments, specifications or provisions which constitute this Contract, the following order of precedence shall apply:

- a. These General Provisions and any amendments thereto, including all of the attachments and Contract forms.
- b. The specifications and requirements contained in the RFP as incorporated herein and the agreements to meet the specifications and requirements in the RFP as stated in the Proposal. (The parties acknowledge and agree that silence in the Proposal with respect to a particular RFP specification or requirement equals consent by Contractor.)
- c. All other documents incorporated in the Contract by reference.
- d. All regulatory filings made pursuant to the terms and conditions of this Contract.

## 12. DELIVERY

Contractor shall strictly adhere to the delivery and completion schedules specified in this Contract subject to Section 28. Time, if stated as a number of days, shall mean calendar days unless otherwise specified. If Contractor delivers in excess of the quantities or Services specified herein, the State shall not be required to make any payment for the excess Deliverables or Services, and may return them to Contractor at Contractor's expense or utilize any other rights available to the State at law or in equity.

## 13. SUBSTITUTIONS

Substitution of Deliverables and Services may not be tendered without advance written consent of the State. The State will not unreasonably withhold its consent. Contractor shall not use any specification in lieu of those contained in the Contract without written consent of the State.

## 14. INSPECTION, ACCEPTANCE AND REJECTION

Unless otherwise specified in the Contract:

- a. Contractor and its subcontractors will provide and maintain a quality assurance system mutually agreed upon by the Contractor and the State covering Deliverables and Services under this Contract and will tender to the State only those Deliverables and Services that have been inspected and found to conform to this Contract's requirements. Contractor will keep records consistent with the agreed upon quality assurance system, and will make these records available

effects of such harmful code, including restoration of any lost data using generally accepted data restoration methods.

- c. Contractor warrants that the Services shall be performed, and all Deliverables and other materials prepared and delivered, in a timely, professional, efficient, diligent and workman-like manner, in accordance with the highest recognized professional standards and practices of quality and integrity in the industry, by qualified personnel fully familiar with the technology and methodologies used in performing the Deliverables and Services, and be fit for use as reasonably intended by the parties.
- d. Contractor represents and warrants that, as of the Effective Date, there is no outstanding or reasonably anticipated civil or criminal litigation, arbitrated matter, or other dispute, in any forum, to which Contractor or any of its Affiliates is a party that, if decided unfavorably to Contractor or its Affiliates, would reasonably be expected to preclude Contractor from entering into this Contract or have a material adverse effect on Contractor's ability to fulfill its obligations hereunder.
- e. Contractor represents and warrants (i) all Equipment, networks, Software and other resources utilized or provided by Contractor in connection with the Deliverables and Services (collectively, the "**Provided Resources**") shall be successfully interfaced with, and shall be compatible with, the services, systems, items, and other resources of the State and its other third party service providers with which they will interoperate (collectively, the "**State Resources**"), and (ii) none of the Deliverables, Services or other items provided to the State by Contractor shall be adversely affected by, or shall adversely affect, the State Resources or any Services provided by any such third party service providers, in any material respect, whether as to functionality, speed, service levels, interconnectivity, reliability, availability, performance, response times, or otherwise.
- f. Contractor represents and warrants that: (i) it has conducted a full and complete analysis of the State's requirements as specified in this Contract; (ii) it has performed sufficient due diligence investigations regarding the scope and substance of the Services and the Deliverables; (iii) it has received sufficient answers to all questions that it has presented to the State regarding the scope and substance of the Services and the Deliverables as well as the workings, capabilities, procedures, and capacities of the State's networks, equipment, hardware, and software associated with the provision of the Services and Deliverables; and (iv) it is capable in all respects of providing the Services and Deliverables in accordance with this Contract. Contractor hereby waives and releases any and all claims that it now has or hereafter may have against the State based upon any inaccuracy or incompleteness of the information it has received with regard to the scope and substance of the Services and the Deliverables, except where such information was willfully withheld or intentionally misrepresented by the State and where such claims are permitted under California law. Further, Contractor covenants that it shall not seek any judicial rescission, cancellation, termination, reformation, or modification of this Contract or any provision hereof, nor any adjustment in the charges to be paid for the Deliverables or Services, based upon any such inaccuracy or incompleteness of information except where such information was willfully withheld or intentionally misrepresented by the State.
- g. Contractor represents and warrants that Contractor, at Contractor's expense, shall (and shall cause all of its subcontractors to) maintain all Equipment, Systems, networks, and Software operated or

- b. After receipt of a Notice of Termination, and except as directed by the State, Contractor shall immediately proceed with the following obligations, as applicable, regardless of any delay in determining or adjusting any amounts due under this clause. Contractor shall:
  - i. Stop work as specified in the Notice of Termination (except as required by any Disentanglement Services).
  - ii. Place no further subcontracts for materials, Services, or facilities, except as necessary to complete the continuing portion of the Contract.
  - iii. Terminate all subcontracts to the extent they relate to the work terminated.
  - iv. Settle all outstanding liabilities and settlement proposals arising from the termination of subcontracts.
- c. Contractor and the State agree that the State shall have no obligation to pay any amount to Contractor upon the termination for convenience, other than, and in accordance with the terms of this Contract, the agreed price for Deliverables or Services accepted by the State and not previously paid for, adjusted for any savings on freight and other charges plus any unrecovered amortized capital costs originally identified in writing by Contractor and approved in advance by the State, calculated using Generally Accepted Accounting Principles. Contractor shall submit a final termination settlement proposal within ninety (90) calendar days from the effective date of termination.

## **20. TERMINATION FOR DEFAULT**

- a. The State may, subject to the clause titled “Force Majeure” (Section 21) and to subsection d. below, by written notice of default to Contractor, terminate this Contract in whole or in part if Contractor fails to:
  - i. Deliver the Deliverables or perform the Services within the time specified in the Contract or any amendment thereto;
  - ii. Make progress, so that the lack of progress endangers performance of this Contract; or
  - iii. Perform in accordance with any of the other provisions of this Contract.
- b. The State’s right to terminate this Contract under subsection a. above, may be exercised if (i) the failure constitutes a material breach of this Contract and if Contractor does not cure such failure within the time frame stated in the State’s cure notice, which in no event will be less than thirty (30) calendar days, unless a shorter period is specifically set forth elsewhere under this Contract; or (ii) there are repeated or numerous failures by Contractor for which the State has provided notice, which collectively constitute a material breach of this Contract. Without limiting the generality of the foregoing, Contractor hereby agrees that each of the following events shall be deemed a material breach by Contractor:

- i. Contractor's failure to comply with its obligations under Sections 36.a, 77, 78, 83.a and/or 84;
    - ii. Submission of inaccurate reports or invoices that result in a material adverse financial impact on the State;
    - iii. Any modifications or alterations to an Ordering Document, Individual Price Reduction Notification document, Authorization to Order Under State Contract or ICB Pricing documentation by Contractor that were not authorized or approved by the State;
    - iv. Contractor's refusal to provide Services and Deliverables requested hereunder pursuant to a proper Ordering or Individual Price Reduction Notification Document; and
    - v. Any efforts by Contractor, without the State's prior approval, to market to or otherwise solicit the following entities to enter into a separate agreement for deliverables and services that are the same or substantially similar to the Deliverables and Services: (a) an entity that is receiving such particular Deliverables and Services under this Contract or (b) an entity that is mandated by the State to obtain Deliverables and Services pursuant to this Contract.
  - c. If the State terminates this Contract in whole or in part pursuant to this Section, it may acquire from an alternative provider, under terms and in the manner the State considers appropriate, Deliverables or Services similar to those terminated, and Contractor will be liable to the State for the State's Cost to Cover (but subject to the clause entitled "Limitation of Liability" (Section 23)). However, Contractor shall continue to provide all Deliverables and Services not expressly terminated by the State.
  - d. If the Contract is terminated for default, the State shall be entitled to require Contractor to, and Contractor shall, transfer title, or in the case of licensed Software, license, and deliver to the State, as directed by the State, any;
    - i. Completed Deliverables, and
    - ii. Partially completed Deliverables.
- Upon direction of the State, Contractor shall also protect and preserve property in its possession in which the State has an interest.
- e. The State shall pay the agreed upon Contract price for completed Deliverables, partially completed Deliverables provided pursuant to subsection d. above, and Services delivered and accepted.
  - f. If, after termination, it is determined by a final ruling in accordance with the dispute resolution process under this Contract that Contractor was not in default, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the State.

**23. LIMITATION OF LIABILITY**

- a. Contractor's liability for damages to the State for any cause whatsoever, and regardless of the form of action, whether in contract or in tort, shall be limited to \$50 Million, except as expressly set forth below.
- b. The State's liability for damages for any cause whatsoever, and regardless of the form of action, whether in contract or in tort, shall be limited to the total charges due and payable to Contractor hereunder that have not been paid to Contractor. Nothing herein shall be construed to waive or limit the State's sovereign immunity or any other immunity from suit provided by law.
- c. Neither Contractor nor the State will be liable for consequential, incidental, indirect, special, or punitive damages, even if notification has been given as to the possibility of such damages, except as expressly set forth below.
- d. Sections 23(a) and (c) will not apply to Contractor's liability for damages (i) to the extent that Contractor's liability for such damages is specifically set forth in the Statement of Work; (ii) in connection with liability under the provision, entitled "Patent, Copyright, and Trade Secret Protection" (Section 32) or to any other liability (including without limitation indemnification obligations) for infringement of third party Intellectual Property Rights; (iii) in connection with claims covered by any specific provision herein calling for performance deficiency charges; (iv) in connection with claims arising under provisions herein calling for indemnification for third party claims against the State for bodily injury to persons or damage to real or tangible personal property caused by Contractor's negligence or willful misconduct; (v) in connection with costs or attorneys' fees that the State becomes entitled to recover as a prevailing party in any action; (vi) in connection with breaches of Contractor's obligations of confidentiality; (vii) in connection with claims based upon a breach of Section 36.a hereof or upon any repudiation of this Contract by Contractor or Contractor's refusal to perform its duties and obligations hereunder; (viii) for Cost to Cover damages; (ix) in connection with Contractor's failure to perform its obligations under Section 21 in the event of a force majeure event; or (x) in connection with Contractor's failure to comply with the terms of Section 30.

**24. CONTRACTOR'S LIABILITY FOR INJURY TO PERSONS OR DAMAGE TO PROPERTY**

- a. Contractor shall be liable for damages arising out of injury to person(s) and/or damage to the property of the State, employees of the State, or any other person(s) designated by the State for any purpose, prior to, during, or subsequent to delivery, installation, acceptance, and use of the Deliverables or Services either at Contractor's site or at the State's place of business, provided that the injury or damage was caused by the fault, negligence, or willful misconduct of Contractor.
- b. Contractor shall not be liable for damages solely arising out of or caused by an alteration or an Attachment not made or installed by Contractor, or for damage to alterations or Attachments that may result from the normal operation and maintenance of the Deliverables provided by Contractor during the Contract.

- b. Contractor agrees to cooperate fully in providing reasonable access to its records, documents, agents or employees, or premises if reasonably required by authorized officials of the State, the Department of Industrial Relations, or the Department of Justice to determine Contractor's compliance with the requirements under paragraph (a).

#### **46. RECYCLING**

Contractor shall certify in writing under penalty of perjury, the minimum, if not exact, percentage of post consumer material as defined in the Public Contract Code Section 12200, in products, materials, goods, or supplies offered or sold to the State regardless of whether the product meets the requirements of Section 12209. With respect to printer or duplication cartridges that comply with the requirements of Section 12156(e), the certification required by this section shall specify that the cartridges so comply (PCC 12205).

#### **47. CHILD SUPPORT COMPLIANCE ACT**

For any Contract in excess of \$100,000, Contractor acknowledges in accordance with Public Contract Code Section 7110, that:

- a. Contractor recognizes the importance of child and family support obligations and shall fully comply with all applicable State and federal laws relating to child and family support enforcement, including, but not limited to, disclosure of information and compliance with earnings assignment orders, as provided in Chapter 8 (commencing with Section 5200) of Part 5 of Division 9 of the Family Code; and
- b. Contractor, to the best of its knowledge is fully complying with the earnings assignment orders of all employees and is providing the names of all new employees to the New Hire Registry maintained by the California Employment Development Department.

#### **48. AMERICANS WITH DISABILITIES ACT**

Contractor represents and warrants to the State that Contractor currently complies and at all times during the Term of this Contract will comply with the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*).



**51. SET-OFF RIGHTS**

Notwithstanding anything to the contrary in this Contract, and in addition to the other rights of the State and/or the applicable Customer hereunder with respect to disputing invoices or withholding amounts, the State and/or the applicable Customer, in its sole discretion, may set off against any and all amounts otherwise payable to Contractor pursuant to any of the provisions of this Contract: (i) any and all amounts claimed by the State and/or the applicable Customer in good faith to be owed by Contractor to the State and/or the applicable Customer pursuant to any of the provisions of this Contract; and (ii) any and all amounts that the State and/or the applicable Customer believes in good faith that it does not owe to Contractor pursuant to any of the provisions of this Contract. Within twenty (20) calendar days after any such set-off by the State and/or applicable Customer, the State and/or applicable Customer shall provide Contractor with a written accounting of such set-off, a written statement of the reasons therefore, and a reasonable opportunity to meet and discuss the claimed set-off. In the event Contractor does not agree with the set-off applied, Contractor or applicable Customer may contact DTS/ONS to seek equitable resolution or exercise its right under applicable law. The escalation procedure beyond the project manager in Section 35 shall not apply.

**52. CONTRACTOR PERSONNEL**

- a. When Contractor needs access to State's premises to perform the required Services under this Contract, Contractor personnel shall perform their duties during State's regular work days and normal work hours, except as may be specifically agreed to otherwise by the State and Contractor.
- b. The State reserves the right to disapprove the continuing assignment of Contractor personnel working on State premises. If the State exercises this right, and Contractor cannot immediately replace the disapproved personnel, the State agrees to an equitable adjustment in schedule or other terms that may be affected hereby.
- c. Contractor will make every effort consistent with sound business practices to honor the specific request of the State with regard to assignment of its employees; however, subject to the above paragraph and the paragraph below, Contractor reserves the sole right to determine the assignment of its employees. If a Contractor employee is unable to perform due to illness, resignation, or other factors beyond Contractor's control, Contractor will make every reasonable effort to provide suitable substitute personnel.
- d. Contractor represents that the individuals designated as Key Personnel in the Contract are, and promises that any subsequent Key Personnel shall be, experienced professionals, possessing the appropriate knowledge, skills, and expertise to perform properly their assigned duties. With regard to each of the Key Personnel, including replacements for the Key Personnel, Contractor shall exercise every reasonable effort to not transfer the Key Personnel during the first eighteen (18) months (or such other time periods as may be specified in the RFP or any Statement of Work) after the date that such individual commences performing Services as one of the Key Personnel hereunder. Contractor may transfer or terminate Key Personnel at any time in the event the needs of Contractor's business support a transfer, or the individual is eligible for a promotion or other positive type of employment opportunity, or the individual's personal life

this Contract at no additional cost to the State. When the Enhancements do not substitute, replace or improve Deliverables or Service items already being received by the State under this Contract, but instead add to the Deliverables or Service items additional material functionality and features), Contractor will make such Enhancements available to the State under this Contract and provide competitive pricing therefore unless Contractor in its sole discretion determines that the Enhancement would be provided at no additional charge. With each proposal to add an Enhancement, Contractor will provide a business case that includes potential users and market analysis that illustrates competitive pricing, if applicable. The State, in its sole discretion, shall determine whether to approve of such Enhancement's inclusion under this Contract. If the State chooses to proceed hereunder, the State and Contractor will negotiate in good faith to agree on the additional terms and conditions, if any, under which the Enhancement will be added to this Contract through amendment and Contractor shall update any applicable marketing plans used in connection with the provision of the Deliverables and Services hereunder. Contractor understands that DTS/ONS is fully responsible for this approval and agrees, absent written approval from DTS/ONS, Enhancements cannot be added to this Contract at the request of any State or non-State Agency. Consistent with and without limiting anything set forth in Section 57, nothing in this Section shall prohibit the State from pursuing or obtaining the same or similar Enhancements with or from its other providers of Module Services or requiring that certain Enhancements may only be obtained from certain providers of Module Services.

## **69. PRICING AND SERVICE REVIEW**

For the purpose of maintaining competitiveness throughout the Term, Contractor agrees to joint review of its pricing and Service functionality annually, or more frequently (not to exceed three (3) such reviews in any twenty-four (24) month period unless otherwise agreed by the parties) at the State's request, to ensure the State and its Customers will receive cost-competitive and technologically competitive Services throughout the Term. Contractor agrees that written amendments to this Contract to reduce statewide rates and introduce technological Service improvements may be submitted throughout the Term.

## **70. "MOST FAVORED NATION" STATUS OF STATE**

Contractor agrees to give the State and Customers of this Contract "Most Favored Nation" status, in that Contractor agrees that no other similarly situated public customer of Contractor or any of its Affiliates will receive rates for a substantially similar service, or suite of services, offered under substantially similar terms and conditions that are lower than the statewide rates provided hereunder when the volume of business from the other public customer is equal to or less than the volume of business the State delivers under this Contract. Contractor agrees to promptly bring to State's attention instances in which other public customers of Contractor or any of its Affiliates may receive lower rates for substantially similar services. If Contractor or its Affiliates offer lower rates to any other public customer for the same or a substantially similar service, or suite of services, offered under substantially similar terms and conditions, Contractor shall adjust the State's rates prospectively to match or beat such rates. If Contractor offers a bundled package of Deliverables and/or Services under substantially similar terms and conditions to other public Customers at a rate lower than the rate(s) charged to the State for such Deliverables and/or

Services provided under this Contract, the State reserves the right to order a similarly bundled package of Deliverables and/or Services at such lower rate. At the end of each Contract year, an executive level officer of Contractor shall certify in writing to the State that Contractor has complied with this provision. If Contractor is not in compliance with this Section, Contractor and the State shall make adjustments and/or payment as necessary and described above and in Section 50. Nothing herein shall be construed to require Contractor to offer, provision or sell Services in a manner that conflicts with applicable laws or regulations.

Rates established through the ICB and IPR processes described in Sections 71 and 72 respectively are exempt from this “Most Favored Nation” qualification.

## **71. INDIVIDUAL CASE BASIS (ICB) PRICING**

The State requires Contractor to list all Services in Attachment 3 and all Service pricing in Attachment 4. However, the State recognizes there may be instances where Contractor cannot anticipate or establish a specific cost for a Service because of issues such as complexity, facility availability, or other Service provisioning requirements. The State will consider the use of Individual Case Based Pricing only in specific situations and under the parameters detailed below:

- a. Contractor will provide documentation to the State that demonstrates that its ICB Pricing is developed through its corporate ICB process and is consistent with CPUC and other appropriate regulatory guidelines as applicable. Contractor further affirms that ICB Pricing opportunities will be offered in a consistent manner to all eligible Customers.
- b. ICB Pricing is a Customer specific pricing methodology approved by applicable regulatory agencies. The following components are examples of elements to be considered in developing an ICB Pricing methodology:
  - i. Capital investment required by Contractor, including the pro-rata share of existing capital and new incremental capital dedicated to the opportunity.
  - ii. Related expense to provide the Service, including expense such as installation, repair, billing, monitoring, on-going maintenance and other business and operating expense.

Contractor shall provide to the State a description of the components of its approved ICB Pricing methodology as part of the documentation required under subsection (a), above.

ICB Prices will only be offered if the prices are determined by Contractor and the State to be financially feasible and in the interest of the Customer. In the event a Customer requests Service that Contractor deems financially unfeasible, Contractor will provide the rationale for its decision and discuss other potential Service options with DTS/ONS before advising the Customer of the unavailability of ICB Prices.

ICB Pricing that is defined as a Managed Project shall be consistent with the terms and conditions of this Contract.

compliance within a re-adjusted time frame established by the State. Contractor shall have seven (7) calendar days, or longer if agreed to by the State in writing, to achieve compliance. For each material Disentanglement or Transition-Out requirement not completed after the notice of non-compliance period, the State shall be entitled to invoice Contractor for up to \$2,000 per day for each material deficiency, not to exceed \$10,000 per day for all deficiencies until Contractor is in material compliance with the requirements of the Transition-Out Plan. The Contractor may exercise its dispute rights under Section 35 above in the event that Contractor disagrees with the State's application of this Section; however, pending final resolution of any dispute, Contractor shall diligently proceed without disruption or delay with the performance of the Transition-Out Plan.

- e. Charges. All Disentanglement Services performed by Contractor during the transition shall be performed by Contractor at no additional cost to the State beyond what the State would pay for the Services. Unique services requested by the State will be priced as agreed upon by the parties.
- f. Delivery of State Data. Contractor shall provide to the State all State data and documentation and other information reasonably requested by the State in connection with the transition that is sufficient to enable the State, or another reasonably competent service provider, to fully assume the provision of any terminated Services. Except as Contractor is otherwise required to retain such data under this Contract or by law, Contractor shall destroy all copies of State data not turned over to the State.
- g. Inventory. To the extent applicable to the Services provided by Contractor hereunder, Contractor shall provide to the State as complete and accurate an inventory as is reasonably practicable of all Software, data, Equipment, materials, third party licenses, third party leases, and third party contracts used to provide the Services, as well as the location thereof, entities serviced under this Contract by such items, and such other information regarding such items as the State reasonably requests.
- h. Transfer of Assets. Effective as of the date of termination, Contractor shall, subject to Section 87, use commercially reasonable efforts to convey to the State (or its designee) such physical assets as the State may, in its sole discretion, select from among those assets that are onsite CPE and substructure not already fully paid for by the State and used by Contractor solely in or for the provision of Services to the State, excluding those assets expressly agreed upon by the parties in writing from time to time, at a price consisting of the aggregate net book value of such selected assets at that time, less the amount(s) already paid by the State for such assets.
- i. Transfer of Leases, Licenses and Contracts. Effective as of the date of termination, Contractor, at its expense, shall use commercially reasonable efforts to convey or assign to the State (or its designee) such leases, licenses, and other contracts as the State may, in its sole discretion, select from among those directly associated with the use of properties, Software, or other goods or services by Contractor that were specifically obtained, licensed or purchased in order for the State to obtain Services. Notwithstanding anything to the contrary in this Contract, Contractor shall be responsible for the satisfaction and performance of all obligations (including all financial obligations) under any such leases, licenses, and other contracts that may be assigned or conveyed to the State (or its designee) with respect to periods prior to the date of any such conveyance or assignment.

- j. License. Except as otherwise provided herein, Contractor shall use commercially reasonable efforts to assign or license to the State (or its designee) whatever rights Contractor possesses at the time of Disentanglement with regard to Software, materials and other items that are needed in order to allow the State (or its designee) to continue to perform and receive the benefit of the Services. To the extent allowed by the applicable owner or licensor and to the extent the following are accessible by Contractor, Contractor shall provide the State with a full and complete copy of each such item that constitutes Software, in such forms and media as reasonably requested by the State, together with all object code, source code, and then-available documentation thereto.

## 78. REPORTS, DATA AND INVENTORY

Contractor shall provide all reports required by this Contract or otherwise reasonably requested by the State. In addition to performing its obligations under Sections 77.f and 77.g as part of Disentanglement Services, upon the State's reasonable request, at reasonable intervals and for any reason related to the Contract and Services provided under the Contract, during the Term of the Contract, Contractor shall: (a) provide to the State all State data and documentation and all other information reasonably requested by the State; and (b) Contractor shall provide to the State as complete and accurate an inventory as is reasonably practicable of all Deliverables and Services provided under the Contract, including Software, data, Equipment, materials, third party licenses, third party leases, and third party contracts used to provide the Services, as well as the location thereof, entities serviced under this Contract by such items, and such other information regarding such items as the State reasonably requests.

## 79. DISASTER RECOVERY AND SECURITY PLAN

Within ninety (90) calendar days after the Effective Date, Contractor shall develop and submit to the State, for the State's review, comment and approval, a detailed disaster recovery and security plan applicable to all of the Services ("**Disaster Recovery and Security Plan**"); provided, however, that to the extent any portions of the Disaster Recovery and Security Plan are developed prior to the expiration of such ninety (90) day period, Contractor shall deliver such portions to the State as soon as they are so developed. Except where agreed to by the State, such detailed Disaster Recovery and Security Plan shall be consistent in all respects with the requirements (if any) set forth in this Contract (including the RFP) and the Disaster Recovery and Security processes submitted by Contractor as part of the Proposal. Immediately upon the State's approval of the Disaster Recovery and Security Plan, Contractor shall implement the same in accordance with its provisions. Contractor shall ensure that the Disaster Recovery and Security Plan, and the corresponding disaster recovery and security Services provided by Contractor, shall be consistent with any limitations imposed by law and shall be appropriate and comprehensive, using industry best practices and methods and state-of-the-art technology, to at all times ensure the availability, security, integrity and confidentiality of the Deliverables and Services. At least thirty (30) calendar days prior to each anniversary of the Effective Date, Contractor shall revise the Disaster Recovery and Security Plan as appropriate to reflect any changes to the State's information-technology

service-providers to Contractor. The Term of this Contract shall commence on the Effective Date and shall continue until the end of the fifth (5<sup>th</sup>) anniversary of the Effective Date (the “**Term**”). In addition, the State may, at its sole option, elect to extend the Term for up to two (2) additional periods of one (1) year each. The State may exercise its option to extend by giving written notice of extension to Contractor prior to expiration of the Term. Contractor shall provide a reminder letter to the State ninety (90) calendar days prior to the end of the Term and each extension thereof if the State shall not have previously provided written notice to Contractor of its intent to extend the Contract prior to such dates.

## **82. SUBCONTRACTORS**

Except as reflected in Contractor’s Proposal, Contractor shall not subcontract all or any part of the Service without the prior written consent of the State, which will not be unreasonably withheld; provided, however, that Contractor may subcontract for internal infrastructure support, not specifically for this Contract, without notice to or consent from the State. Each subcontractor will perform only the specific Services described with regard to such subcontractor in a written request submitted by Contractor to the State when seeking such consent; and no change may be made to the specific Services performed by a particular subcontractor, and no substitution, replacement, or change of subcontractors may be made, without the advance written consent of the State, which will not be unreasonably withheld. All performance of Services by each subcontractor shall at all times be in accordance with the terms and conditions of this Contract. Contractor covenants that its arrangements with subcontractors shall not prohibit or restrict any such subcontractor from, at any time, entering into direct agreements with the State. The State’s consent with respect to Contractor’s use of a particular proposed subcontractor, shall be given or withheld in writing within Contractor’s reasonably requested timeframe, and, if such consent is withheld, the State’s notice thereof to Contractor shall set forth the reasons for such withholding of consent. If the State determines in good faith and in a commercially reasonable manner that the performance or conduct of any subcontractor is unsatisfactory, the State may notify Contractor of its determination in writing, indicating the reasons therefore, in which event Contractor shall promptly take all necessary actions to remedy the performance or conduct of such subcontractor or to replace such subcontractor by another third party or by Contractor personnel. Contractor shall be solely and exclusively responsible for supervising the activities and performance of each subcontractor. Contractor and each such subcontractor shall be jointly and severally responsible for any act or omission of such subcontractor engaged to provide Deliverables and Services under this Contract. Notwithstanding the fact that a subcontractor may be the party actually performing a particular Service or providing a particular Deliverable hereunder, Contractor shall at all times: (i) constitute the primary obligor for all of Contractor’s duties and obligations hereunder; and (ii) be liable and responsible as a principal for the performance of all of the duties and obligations of Contractor hereunder that Contractor may elect to subcontract to any of its subcontractors or to any other third party.

## **83. DE MINIMIS SERVICE REQUESTS**

Notwithstanding anything to the contrary provided in this Contract, if (i) the DTS/ONS at any time during the Term requests services, products, or resources from Contractor and the parties cannot agree as to whether such services, products, or resources are included as part of the Services offered under this